CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 445

THE UNITED STATES OF AMERICA, PETITIONER

vs.

STANLEY J. PATRYAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1937
CERTIORARI GRANTED NOVEMBER 8, 1937

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6101

THE UNITED STATES OF AMERICA,

Appellant,

vs.

STANLEY J. PATRYAS,

Appellee.

Counsel for Appellant:
MR. MICHAEL L. IGOE,

Counsel for Appellee:
MR. STEPHEN A. CROSS,
MR. HENRY A. GANO,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

J-12579 The Gunthorp-Warren Printing Company, Chicago—12-18-36—35

INDEX.

Placita 1
Complaint, filed Jan. 15, 1932 2
Notice of filing petition 5
Answer, filed May 11, 1936 6
Amended petition, filed Apr. 14, 1936 11
Order of Apr. 14, 1936, granting plaintiff leave to file instanter amended petition 16
Trial 16
Verdict 17
Order of June 13, 1936, overruling defendant's motion for judgment, etc. 17
Judgment, entered June 18, 1936 18

Bill of Exceptions.

Stipulated facts 19
Descriptions of Plaintiffs' Exhibits 1 to 25 ..... 20 to 27
Plaintiff's Witnesses:
- Hulbert, Dr. Harold S. 38
- Konopa, Joseph F. 29
- Patryas, Anna 37
- Patryas, Stanley J. 34
- Schuttenmahier, Albert 27

Defendant's Witnesses:
- Bowes, Leon B. 43
- Cohn, George V. 40
- Field, Albert 42
- Randolph, Henry E. 41

Descriptions of Plaintiffs' Exhibits 1 to 25 ..... 20 to 27
Descriptions of Defendant's Exhibits A-B-C 44
Colloquy 44

Reference to overruling of defendant's motion for directed verdict 45
Instructions of the Court 45
Verdict 48
Reference to order overruling defendant's motion for directed verdict and findings of fact, etc. 48
Certificate of Judge 48

Petition for appeal 49
Assignment of errors 49
Order allowing appeal 53
Order extending time for filing bill of exceptions and transcript of record 53
Praecipe for record 54
Certificate of Clerk 54
Citation 55

Proceedings in U. S. C. C. A., Seventh Circuit 56
Caption 56
Minute entry of argument and submission 56
Opinion, Evans, J 57
Judgment 60
Clerk's certificate 61
Order allowing certiorari 62

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable William H. Holly, District Judge of the United States for the Northern District of Illinois on Eighteenth day of June, in the year of our Lord one thousand nine hundred and Thirty-Six, being one of the days of the regular June Term of said Court, begun Monday, the First day of June, and of our Independence the 160th year. Placita.

Present:

Honorable William H. Holly
William H. McDonnell, U. S. Marshal.
Henry W. Freeman, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois

Eastern Division

Stanley J. Patryas,
vs
United States of America. } No. 40340

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 15th day of January, 1932.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

Filed Jan. 15, 1932.

* * (Caption—40340) * *

COMPLAINT * WAR RISK INSURANCE.

Plaintiff complains of the defendant and alleges:

I.

That Plaintiff is a citizen of the United States and a resident of the Northern District, Eastern Division of the State of Illinois, and the City of Chicago, County of Cook therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, A. D., 1917, and the World War Veterans' Act of June 7, A. D., 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on or about the 5th day of October, A. D., 1917, plaintiff entered the armed forces of the defendant; that he served

the defendant as a Private in Company "B" 5th Motor Supply Train, from the said 5th day of October, A. D., 1917, to on or about the 29th day of July, A. D., 1919, when he was honorably discharged from said service and that during all of said time he was employed in active service of the defendant.

4

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of Ten Thousand and No/100 ($10,000.00) Dollars by the defendant, who thereafter issued to plaintiff its certificate No. T-1110156 of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said bureaus and the directors thereof, and that during the term of his said service the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy while he was in service and some time after his discharge.

V.

That while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as Mastorditis Right, Otitis Media, Colesteatoma and Psycho Neurosis, Hysteria, and other disabilities as shown by United States Veterans Bureau file.

VI.

That said diseases, injuries and disabilities have continuously since July 29th, 1919, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain that they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since July 29th, 1919, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

5

VII.

That plaintiff on or about February, 1931, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on November 21, A. D., 1931, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same.

VIII.

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of Fifty-Seven and 50/100 Dollars ($57.50) for each and every month transpiring from July 29, A. D., 1919, and continuously thereafter so long as he lives and continues to be permanently and totally disabled, less such amount as defendant has paid, if any.

IX.

That plaintiff has employed the services of Henry A. Gano, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of Illinois. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended.

X.

Wherefore Plaintiff prays judgment as follows:

First: That plaintiff since July 29, A. D., 1919, has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from the said 29th day of July,

6 A. D., 1919, and continuously so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney a

reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

Henry A. Gano,
Attorney for Plaintiff.

State of Illinois, } ss.
County of Cook. }

Stanley J. Patryas, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge and belief, except as to those matters stated to be upon information and belief and as to those matters he believes it to be true.

Stanley J. Patryas.

Subscribed and sworn to before me this 15th day of January, A. D., 1932.

Mary M. Jordan,
Notary Public.

(Seal)

7 And on, to wit, the 20th day of January, 1932, came the Petitioner by his attorneys and filed in the Clerk's office of said Court a certain Notice in words and figures following to wit: Filed Jan. 20, 1932.

8 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

NOTICE OF FILING PETITION ON GOVERNMENT INSURANCE POLICY OR CERTIFICATE UNDER TUCKER ACT OF MARCH 3, 1887, AND WORLD WAR VETERANS ACT AS AMENDED.

To the Honorable George E. Q. Johnson, United States Attorney for the United States District Court at Chicago, Illinois, Northern District of Illinois, Eastern Division:

Please Take Notice that Petition in the above entitled cause

was duly filed with the Clerk of the United States District Court for the United States District at Chicago, Illinois, Northern District, Eastern Division, on the 15th day of January A. D., 1932, which court has jurisdiction of the cause set forth in said Petition and in which district petitioner resides.

Dated at Chicago, Illinois, this 15th day of January, A. D. 1932.

Henry A. Gano,
Attorney for Petitioner.

Received copy of the within notice of filing Petition against the United States under the Tucker Act, together with copy of said Petition and Summons is hereby admitted this 15th day of January A. D. 1932.

George E. Q. Johnson.

Filed May 11, 1936.

9 And on, to wit, the 11th day of May, 1936 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

10 In the District Court of the United States.

* * (Caption—40340) * *

ANSWER.

Comes now the defendant in the above styled cause by Michael L. Igoe, United States Attorney, Edmond Sullivan, Assistant United States Attorney, and William M. Lytle, Attorney, Department of Justice, attorneys of record for the defendant in the above styled cause and for answer to plaintiff's petition alleges:

I.

The defendant denies for want of information or belief that the plaintiff, Stanley J. Patryas, is a citizen of the United States, resident of the Northern District of Illinois, Eastern Division, City of Chicago, County of Cook.

II.

The defendant admits that this action is brought by the plaintiff under the terms of the War Risk Insurance Act of

October 6, 1917, and the World War Veterans' Act of 1924, as amended July 3, 1930, and is based upon contracts of insurance issued by the United States of America, under and by virtue of said Acts to the plaintiff.

III.

The defendant admits that the plaintiff, Stanley J. Patryas, enlisted in the military service of the United States on October 5, 1917, and served in such military service from the said date of his enlistment until July 29, 1919, on which
11 date he was discharged from said military service. The defendant admits that the plaintiff was in the active military service from October 5, 1917 until July 29, 1919.

Count One.

I.

The defendant admits, that while a member of the military forces of the United States, the plaintiff, Stanley J. Patryas, applied for, by his written application dated January 31, 1918, war risk yearly renewable term insurance in the principal sum of $10,000 and admits further that premiums on the said insurance were deducted from the plaintiff's monthly military service pay up to and including the month of July 1919, but states that no further premiums were paid on the said war risk yearly renewable term insurance contract by the plaintiff or by any one on his behalf thereafter.

II.

The defendant denies, that while in the military service of the United States the plaintiff, Stanley J. Patryas, contracted any diseases, injuries or disabilities, and denies, in particular, that the veteran plaintiff contracted diseases, injuries or disabilities resulting in and known as: mastoiditis, right; otitis media; cholesteatoma; psycho-neurosis and hysteria.

III.

The defendant denies the allegations contained in this paragraph of the plaintiff's petition in their entireties.

IV.

The defendant denies that the plaintiff filed a claim with or made application to the defendant through its Veterans' Bureau and the Director thereof, for the payment of the benefits of war risk yearly renewable term insurance on January 26, 1931, or at any other time on or prior to July 3, 1931.

The defendant admits that the Insurance Claims Council of the United States Veterans' Administration has refused to pay to the plaintiff the benefits of war risk yearly renewable term insurance and has denied that he was permanently and totally disabled when his contract of insurance was in full force and effect. The defendant states, therefore, that this lawsuit is and was, at the time it was filed, barred by the statute of limitations, by reason of the provisions of Section 19 of the Act of July 3, 1930, inasmuch as no claim for war risk yearly renewable term insurance was filed in and with the United States Veterans' Administration on or prior to July 3, 1931.

V.

The defendant denies that the plaintiff is entitled to the payment of $57.50 per month for any period or from any period whatsoever, and denies further that the plaintiff was, at any time, permanently and totally disabled when his war risk yearly renewable term insurance contract was in full force and effect.

VI.

The defendant admits that the plaintiff has employed the services of Henry A. Gano and Stephen A. Cross, attorneys and counsellors at law, and that they are duly licensed and admitted to practice before this honorable court, and that ten percent of the amount of the judgment recovered, if any, is a reasonable attorneys' fee.

Wherefore, the defendant prays that Count One (1) of plaintiff's petition be dismissed, that plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with costs, and for such other and further relief as may to the court seem meet and proper, the premises considered.

Count Two.

I.

The defendant admits that, while in the military service and on January 31, 1918, the plaintiff applied for and was granted by the defendant war risk yearly renewable term insurance in the principal sum of $10,000, but states that this insurance lapsed for non-payment of premiums on August 1, 1919, and was reinstated in the full amount of $10,000 on July 1, 1927. The defendant admits further that upon the date of such reinstatement of the said $10,000 war risk yearly
13 renewable term insurance it was converted in the said full amount into a United States Government Five-Year convertible term policy and that premiums were paid on such Five-Year converted policy up to and including at least the month of January 1932, but states that no premiums were paid on such Five-Year converted term policy subsequent to the month of May 1932, further that there is a lien in favor of and payable to the defendant against such converted policy in the amount of $773.90, for which the defendant demands payment from the plaintiff, in the event of a recovery from the defendant in this lawsuit, with interest from the date of the attachment of said lien, namely, July 1, 1927. The defendant also admits that the number of the said United States Government Five-Year convertible policy is K-773-730.

II.

The defendant denies that the plaintiff became totally and permanently disabled on or prior to January 26, 1931, and denies further that the said United States Government Five-Year convertible term policy matured on or prior to January 26, 1931.

The defendant admits that on to-wit: January 26, 1931, the plaintiff made application to the defendant through its United States Veterans' Bureau and the Director thereof for the payment of the benefits of said United States Government Five-Year converted term policy #K-773-730, on account of the alleged total and permanent disability of the plaintiff, but denies that on May 25, 1931 the plaintiff made due proof of his total and permanent disability to the United States Veterans' Bureau or to the defendant.

The defendant admits that on November 21, 1931 the Insurance Claims Council of the United States Veterans' Bureau considered the plaintiff's claim for said insurance benefits and denied the said claim, and admits further that a letter containing notification of the said denial by the Insurance Claims Council was dated at Washington, D. C. November 26, 1931, signed by the Director of Insurance of the United States Veterans' Bureau, and addressed to the plaintiff at Chicago, Illinois.

14 The defendant denies that the plaintiff is entitled to the payment of $57.50 per month from any date or for any period whatsoever, and denies further that the plaintiff became permanently and totally disabled on or prior to to-wit: January 26, 1931, and denies further that the plaintiff is entitled to the return, by the defendant, of any premiums paid on the said insurance contract for any period or from any date.

III.

The defendant admits that the plaintiff has employed the services of Henry A. Gano and Stephen A. Cross, attorneys and counsellors at law, and that they are duly licensed and admitted to practice before this honorable court, and that ten percent of the amount of the judgment recovered, if any, is a reasonable attorneys' fee.

Wherefore, the defendant prays that Count Two (2) of plaintiff's petition be dismissed, that plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with costs, and for such other and further relief as may to the court seem meet and proper, the premises considered.

/s/ M. L. Igoe,
Michael L. Igoe,
United States Attorney.
By: /s/ Edmond Sullivan,
Edmond Sullivan,
Assistant U. S. Attorney.
/s/ Wm. M. Lytle,
Wm. M. Lytle,
Attorney, Department of Justice.

15 And on, to wit, the 14th day of April, 1936 came the Petitioner by his attorneys and filed in the Clerk's office of said Court a certain Amended Petition in words and figures following, to wit: Filed Apr. 1936.

16 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

AMENDED PETITION FOR WAR RISK INSURANCE.

Comes now the Plaintiff by leave of Court first had and obtained and files herewith an amended complaint or petition and alleges:

That the Plaintiff is a citizen of the United States and a resident of the Northern District of Illinois, in the Eastern Division, and the City of Chicago and County of Cook therein.

That this action is brought under the War Risk Insurance Act of 1917 and the World War Veterans' Act of 1924, and amendments and supplements thereto, and is based upon a policy or policies, certificate or certificates of insurance issued under said Acts to the Plaintiff by the Defendant.

That on or about the 5th day of October, A. D. 1917 Plaintiff entered the armed forces of the Defendant; that he served the Defendant as a private from the said 5th day of October, 1917, to on or about the 29th day of July, 1919 when he was honorably discharged from said service and that during all of said time he was employed in the active service of the Defendant.

Count 1.

1. That immediately after entering the Defendant's service Plaintiff made application for and was granted insurance in the sum of Ten Thousand And No/100ths ($10,000.00) Dollars by the Defendant, who thereafter on, to-wit, January 31, 1918, issued to Plaintiff its certificate No. T-1,110,156 of his compliance with said acts, so as to entitle him and his
17 beneficiaries to the benefits of said acts, and the rules and regulations of said bureau and the director thereof, and that during the term of his said service the Defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the Defendant. That Plaintiff paid all pre-

miums promptly when the same became due on said policy while he was in service and after his discharge, until to-wit, August 1, 1919.

2. That while serving the Defendant as aforesaid, the Plaintiff contracted certain diseases, injuries and disabilities resulting in and known as Mastoiditis Right, Otitis Media, Cholesteatima and Psycho-neurosis, Hysteria, and other disabilities as shown by United States Veterans' Bureau file.

3. That said diseases, injuries and disabilities have continuously since July 29th, 1919, rendered and still do render the Plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout Plaintiff's lifetime in approximately the same degree. That Plaintiff has been, ever since July 29th, 1919, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

4. That Plaintiff on or about the 26th day of January, A. D., 1931, made application to the Defendant, through its Veterans' Bureau and the Director thereof, for the payment of his insurance because of permanent and total disability, and that said Veterans' Bureau, and the Director thereof have refused to pay Plaintiff said insurance and on November 21, A. D., 1931 the Insurance Claims Council denied said claim for insurance and afterwards on November 26th, 1931, in a letter addressed to the Plaintiff, the Director of Insurance advised him that his said claim had been denied, which said letter was received by the Plaintiff so that a disagreement now exists between Petitioner and the Veterans Administration concerning his said claim.

18 5. That under the provisions of the said acts and other acts amendatory thereof, Plaintiff is entitled to the payment of Fifty Seven and 50/100ths Dollars ($57.50) for each and every month transpiring from the date he became totally and permanently disabled on or before to-wit, July 29, A. D., 1919, and continuously thereafter so long as he lives and continues to be permanently and totally disabled, less such amount as Defendant has paid, if any.

6. That Plaintiff has employed the services of Henry A. Gano, and Stephen A. Cross, attorneys and counsellors at law, duly licensed and admitted to practice before this court and all courts of the State of Illinois. That a reasonable attorney's fee to be allowed to Plaintiff's attorneys for their

services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended.

7. Wherefore Plaintiff prays judgment as follows:

First: That Plaintiff since, to-wit, July 29, A. D., 1919, and/or while his said insurance was in full force and effect, has been and still is, permanently and totally disabled.

Second: That Plaintiff has judgment against the Defendant for all of the monthly installments of $57.50 per month for each and every month from the said 29th day of July, A. D., 1919, or such date during the life of said policy when plaintiff became totally and permanently disabled, and continuously so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to Plaintiff's attorneys a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

19 Count 2.

1. That immediately after entering the Defendant's service, the Plaintiff made application for and was granted Insurance in the sum of Ten Thousand Dollars ($10,000.00) and afterwards, on, to-wit, July 1, 1927, his said War Risk Term Insurance was converted to a five year convertible term policy and the Defendant issued to him a certificate or policy of insurance bearing Number K-773730 of his compliance with the acts so as to entitle him and his beneficiary to the benefits of said Act and the rules and regulations of the said Veterans' Bureau and the Directors thereof with reference to United States of America converted life insurance and that the Plaintiff paid the monthly premiums provided for in said policy when the same became due until to-wit, the 1st day of February, 1932, when the Plaintiff, by reason of his having previously become permanently and totally disabled, thereby causing the maturing of said policy, ceased to pay premiums thereon.

2. That the said policy of insurance, among other things, provided:

"Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person."

and Plaintiff alleges that afterwards and prior to, to-wit, January 26, 1931, he became totally and permanently disabled and became and was rendered continuously unable to follow any substantially gainful occupation and was then and is now reasonably certain that such disability would continue throughout his life, so that the said insurance matured on and prior to said January 26, 1931.

That on to-wit, January 26, 1931, Plaintiff made application to the Defendant through its Veterans' Bureau and the Director thereof for the payment of his said insurance because of said total and permanent disability and thereafter on, to-wit, the 25th day of May, 1931, made due proof of his total permanent disability to the Veterans' Bureau of the Defendant and the said Insurance Claims Council of the Veterans' Bureau afterwards on, to-wit, November 21, 1931, considered his said claim and denied Plaintiff's said claim to said insurance and afterwards on November 26, 1931, in a letter signed by the Director of Insurance advised him of the said action of the Insurance Claims Council and that his insurance had been denied. By reason whereof a disagreement then existed and now exists between the Veterans' Bureau and the claimant, petitioner herein.

That under the provision of said Act and other Acts amendatory thereof and supplementary thereto, Plaintiff is entitled to the payment of $57.50 for each and every month from and after the date when he became permanently and totally disabled and continuously thereafter so long as he lives and continues to be permanently and totally disabled and is further entitled to the return of all premiums paid by him upon said insurance from and after July 26th, 1930, being six months prior to the date of making claim for said insurance.

3. That Plaintiff has employed the services of Henry A. Gano and Stephen A. Cross, attorneys and counsellors at law, duly licensed and admitted to practice before this Court and all Courts of the State of Illinois. That a reasonable attor-

ney's fee to be allowed to Plaintiff's attorneys for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended.

Wherefore Plaintiff prays judgment as follows:

1. That the Plaintiff, since prior to, to-wit, July 1, 1930, and/or while his said convertible War Risk Insurance was in full force and effect, has been and still is permanently and totally disabled.

2. That Plaintiff have judgment against the Defendant for all of the monthly installments of Fifty Seven and 50/100ths Dollars ($57.50) per month for each and every month
21 from, to-wit, July 1, 1930, or such date during the life of said policy when Plaintiff became totally and permanently disabled and continuously so long as he lives and remains permanently and totally disabled, and that she have and recover from the Defendant all premiums paid by him since he became totally and permanently disabled and made proof thereof to the Veterans' Bureau of the Defendant.

3. Determining and allowing to Plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

/s/ Stephen A. Cross & Henry A. Gano,
Attorneys for Plaintiff.

22 State of Illinois } ss
County of Cook }

Stanley J. Patryas being first duly sworn, says that he is the Plaintiff in the above entitled action; that he has read the foregoing complaint and each and every count thereof; and that each count thereof is true to his own best knowledge, information and belief.

/s/ Stanley J. Patryas.

Subscribed and sworn to before me this 10th day of April, A. D. 1936.

/s/ Stephen A. Cross,
Notary Public.

(Seal)

tered Apr. 14, 1936.

23 And afterwards, to wit, on the 14th day of April, 1936, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly District Judge appears the following entry, to wit:

24 IN THE DISTRICT COURT OF THE UNITED STATES.

April 14, 1936.

Present: Honorable William H. Holly, Judge of Said Court.

* * (Caption—40340) * *

It Is Ordered that leave be and the same is hereby given plaintiff to file instanter Amended Petition and trial continued to May 12, 1936.

tered May 28, 1936.

25 And afterwards, to wit, on the 28th day of May, 1936, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly District Judge appears the following entry, to wit:

26 IN THE DISTRICT COURT OF THE UNITED STATES.

May 28, 1936.

Present: Honorable William H. Holly, Judge of said Court.

* * (Caption—40340) * *

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore impaneled herein for the trial of said cause also come and the Court reserves its ruling on the government's motion at close of all the evidence for a directed verdict until after the return of the verdict and the Jury having heard the evidence by the parties adduced arguments of counsel and charge of the Court retire to their room with sworn Bailiffs to consider of their verdict and during their absence the usual hour of adjournment having arrived

It Is Ordered that when said Jury shall have agreed upon their verdict they shall reduce the same to writing sign and seal the same and they are hereby permitted to separate thereupon all here in open court expressly waive the polling of the Jury after a verdict has been rendered.

27 And on, to wit, the 20th day of May, 1936 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to-wit: Entered M 20, 1936.

28 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—40340) * *

We, the Jury, find the issues for the Plaintiff and we fix the date of his permanent and total disability at The latter part of (1924).

/s/ Philip W. Upp,
Foreman.
/s/ Julius T. Kamenske,
/s/ George Sanders,
/s/ H. H. Higgins,
/s/ L. S. Paddock,
/s/ Anton P. Gabel,
/s/ Thomas J. Pierce,
/s/ James W. Ashby,
/s/ Sam Carahan,
/s/ Robert A. Irvine,
/s/ James P. Atkinson,
/s/ F. William Beere.

29 And afterwards, to wit, on the 13th day of June, 1936, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly District Judge appears the following entry, to wit:

30 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—40340) * *

June 13th, 1936.

Present: Honorable William H. Holly, Judge of said Court.

This day comes the defendant by its attorney and enters herein its motion for judgment on the verdict heretofore entered herein which motion is overruled to which ruling of the Court the defendant by its attorney duly excepts, whereupon the defendant by its attorney enters herein its motion for a

new trial and arrest of judgment which motion is also overruled and denied to which ruling of the court the defendant by its attorney duly excepts, and 90 days time from this date is allowed to file Bill of Exception herein.

red June 1936.

31 And afterwards, to wit, on the 18th day of June, 1936, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

32 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

JUDGMENT.

This cause having come on to be heard and the evidence having been submitted to a jury and the jury having returned its verdict finding the issues in favor of the Plaintiff and against the defendant.

It Is Therefore Ordered, Adjudged and Decreed that the Plaintiff is entitled to judgment upon the said verdict and that the Plaintiff Stanley J. Patryas do have and recover from the United States of America the sum of Thirty Seven Hundred Thirty Seven and 50/100ths Dollars ($3,737.50) as accrued monthly installments of insurance benefits at the rate of Fifty Seven and 50/100ths Dollars ($57.50) per month beginning January 25, 1931 up to and including May 25, 1936, unless the sum of Eleven Hundred Ninety Eight and 49/100ths Dollars ($1;198.49), being a lien of Seven Hundred Seventy Three and 90/100ths Dollars ($773.90) established by Stanley J. Patryas against his converted insurance on July 1, 1927, together with interest thereon at five per cent (5%) compounded annually from July 1, 1927 to June 18, 1936.

It Is Further Ordered, Adjudged and Decreed that the Defendant, United States of America, deduct 10% of the amount of insurance sued upon and involved in this action and pay the same to Stephen A. Cross, attorney for the Plaintiff for his services rendered before this Court, payable at the rate of 1/10 of all back payments and 1/10 of all future payment

made to the Plaintiff or his beneficiary which may hereafter become due on account of said insurance.

Enter:

WILLIAM H. HOLLY,
United States District Judge.

To which findings and judgment entered for the Plaintiff and Defendant, United States of America, duly objects and takes an exception, which exception is hereby allowed.

Whereupon the Defendant moves in arrest of judgment and for a new trial which motions the court overrules and to said action of the Court in overruling the Defendant's motions in arrest of judgment and for a new trial the Defendant excepts, which exception is hereby allowed. Whereupon, upon the motion of the Defendant, the time in which to file its bill of exceptions is extended for 90 days from and after this date.

33 And on, to wit, the 14th day of November, 1936, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Bill of Exceptions in words and figures following, to wit: Bill of Exceptions filed Nov. 14,

34 * * (Caption—40340) * *

BILL OF EXCEPTIONS.

Be it remembered that on the 26th day of May, A. D. 1936, being one of the days of the May Term of the said Court, this cause came on for trial upon the issue joined before the Honorable William H. Holly, one of the judges of the court, on the common law side thereof, and before a jury.

Stephen A. Cross, Kenneth B. Kirk, and Henry A. Gano, Esquires, appeared for the petitioner, and M. L. Igoe, United States Attorney, Edmond Sullivan, Assistant United States Attorney, and William M. Lytle, Attorney Department of Justice, appeared for the defendant.

It was stipulated by and between the parties to the cause that the insured, Stanley Patryas, entered the United States Army on October 5, 1917, and was discharged therefrom July 29, 1919.

It was further stipulated that on January 31, 1918, Stan-

ley J. Patryas, applied for and there was issued to him
35 yearly renewable term War Risk Insurance in the principal sum of $10,000.00; that on August 31, 1919, this insurance lapsed for non-payment of premiums.

That on June 28, 1927, the full amount of this insurance was reinstated by the said Stanley J. Patryas, and that at the same time it was converted into a five year convertible term policy on which premiums were paid up to and including the month of May, 1932, and that this converted policy lapsed on July 1, 1932 for non-payment of premiums.

It was stipulated that the first count in the petition which claimed recovery under the yearly renewable term insurance policy might be dismissed and recovery was relied on in the second count, which claimed recovery under the converted policy.

It was stipulated that the claim for benefits of insurance under policy No. K-773-730, the converted insurance was filed in the United States Veterans Bureau on January 6, 1931.

And thereupon, to maintain the issues on his part, the plaintiff, offered, and there was received in evidence, plaintiff's Exhibit One, in words and figures as follows:

In substance plaintiff's Exhibit One is a five year convertible policy of insurance issued by the United States of America to Stanley J. Patryas in the principal sum of $10,000.00, which takes effect on the first of July, 1927, one of the terms and conditions of which was:

36 "Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months, shall be refunded without interest."

The policy further provided:

"Upon due proof of the total permanent disability of the insured while this policy is in force the monthly installment shall, except as hereinafter provided, be payable to the insured. * * *"

There was offered and received in evidence Plaintiff's Ex-

hibit No. 2, on official form No. 579 of the United States Veteran's Bureau, showing a claim for permanent and total disability insurance benefits filed with the United States Veterans Bureau on May 2, 1931, by the insured, Stanley J. Patryas. This claim was in regard to the converted insurance policy No. K 773-730.

There was offered and received in evidence Plaintiff's Exhibit No. 3, being on official form No. 535 of the United States Veterans Bureau, marked as received May 13, 1931, United States Veterans Bureau, filed by the insured, Stanley J. Patryas, in which he said in regard to his post was occupation that since discharge from military service his occupation has been finisher at the Northwestern Terra-Cotta Company on Clybourn Avenue in Chicago; that he worked there on and off on account of illness from 1920 to August 1, 1924,
37 but he was unable to work since; that the usual number of hours worked per day were nine or less, with irregular weekly wages; that his physical condition has been responsible for loss of time because of periodical mental spells, as well as other ailments, eczema, chest, anemic, amnesia, heart and stomach disorders, neurasthenia, psychoneurosis, hysteria-tentative, vertigo, extremely nervous, etc., destruction of both mastoid cells, and poor memory; that he has not been able to do his full share of work and compete with men employed in the same occupation because of periodical mental spells as well as other ailments, and he was unable to do any work at all from August 2, 1924, because he was physically disabled.

There was offered and received in evidence Plaintiff Exhibit No. 4, being a report of a Neuro-Psychiatric Examination made by Royal Fitch, a Neuro-Psychiatric Examiner with the United States Veterans Bureau, dated August 5, 1924, which examination related to the petitioner, Stanley Patryas, and stated that his subjective symptoms were as follows:

"My stomach bothers me. Feels like I have a lump in it. It makes me sick and dizzy. I get awfully weak and sometimes I faint. It squeezes me through the abdomen and makes me shake all over. My nerves are getting all upset. After I eat I vomit and feel bad. My right ear bothers me. I can't hear good. Sometimes pus runs out of it."

Under "Mental Status" the examination recited that he has a Fourth grade education but they taught him nothing but religion. Orderly and cooperative. Intelligence, judg-

ment, insight and general knowledge limited. Claimant is definitely neurasthenic.

38 Under "Physical and Neurological Findings" the report recited well developed, well nourished white male. Pupils equal and react to light and accomodation. Thyroid negative. Was referred to eye, ear, nose, and throat Examiner for examination. Deep and superficial reflexes brisk and equal. No Romberg, no Babinski, clonus or incoordination. Claimant referred for x-ray examination of G. I. tract. Diagnosis psychoneurosis neurasthenia on a constitutional inferiority basis. Prognosis, unfavorable; condition is constitutional. Claimant is able to resume his prewar occupation, is not bedridden, is able to travel, and is unattended. Hospital care is not advised. Claimant will not accept it. Claimant has a vocational handicap disability of 10 percent. Mental and physical condition such that training is not feasible.

There was offered and received in evidence Plaintiff's Exhibit No. 5, which was a report of a Special eye, ear, nose, and throat examination dated August 6, 1924, and signed by Harlan E. Mize, attending specialist in charge of eye, ear, nose, and throat section of the Veterans Administration. This report bore a diagnosis of Chronic catarrhal otitis media, right ear eczema, canal right, prognosis fair.

There was offered and received in evidence Plaintiff's Exhibit 6, which was the report of a physical examination of Stanley J. Patryas from the files of the U. S. Veterans

39 Bureau made by Dr. M. M. Kulvin, Medical Examiner, which listed the present complaints as pain in upper abdomen about 1½ hour after eating which lasts from two hours to all day long; relieved by belching and vomiting; loss of weight; nervous; shivers; gets weak when he gets this pain; on belching feels warm all over and then gets cold flashes; tires easily; sleeps poorly; poor hearing right ear. Physical examination revealed a slight under nourished white male, eyes negative, nose negative, throat negative; impaired hearing in the right ear; no impairment of resonance; breath sounds normal in the chest. Heart, no enlargment, no murmurs, no accentuation of tones at the base, blood pressure 132-90; Pulse 84. Abdomen, slight tenderness in epigastrium; no masses felt; no swelling; no tenderness; inguinal rings closed. Referred to Neuro-Psychiatrical Section for examination, and it is advised to hospitalize the claimant for a period of observation because of the indefinite picture of the G. I. condition. Diagnosis chronic catarrhal otitis media,

right; deviation of septum; chronic gastritis; neurasthenia; Is able to resume his prewar occupation. Not able to work at present.

There was offered and received in evidence Plaintiff's Exhibit No. 7, dated August 8, 1924, being the report of an X-ray reading of the Gastro-Intestinal Tract of Stanley J. Patryas. The conclusion was that there was no outstanding evidences of distinct lesion of the duodenum or stomach such as duodenal ulcer or malignancy. However, there are certain
40 suggestions of a possible lesion in the first part of the duodenum. This lacks definiteness and should be considered with a clinical evidence, for or against ulcer, etc.

There was offered and received in evidence Plaintiff's Exhibit No. 8, being a report of an Eye, Ear, Nose, and Throat examination made by Harlan E. Mize, Attending Specialist, under date of September 4, 1924, in which a diagnosis was made of chronic catarrhal otitis media, right ear. Eustachian Catarrh. Prognosis, only fair right ear.

There was offered and received in evidence Plaintiff Exhibit No. 9, dated October 14, 1924, being a report of a physical examination of Stanley J. Patryas, made by the United States Veterans Bureau. Chief complaint made by the claimant was partial deafness in the right ear, and pain in abdomen, and continual headaches which make him nervous. Diagnosis was otitis media, chronic catarrhal right ear. The following notation also appears:

"Taking into consideration the lake of pathology shown on X ray, absence of findings on physical examination and marked evidence of Neuro-Psychiatric disease present, it is believed that this patient's disability is entirely of a Neuro-Psychiatric character and that there is no gastro-intestinal disease present."

When this examination was made the patient had been admitted to the hospital on the 26th of August, 1924, and was marked discharged on the 28th of September, 1924, because he was absent without leave. Report recites that he left on
41 the 19th of September because his wife was having an operation, and the patient never returned.

There was offered and received in evidence the report of a physical examination of Stanley Patryas, made by the United States Veterans Bureau, marked Plaintiff's Exhibit No. 10, dated December 30, 1924. As a result of a general physical examination on this date it was found that Patryas had a deviated nasal septum; chronic bronchitis, mild; as a

result of the special eye, ear, nose and throat examination, it was found that he had otitis media; chronic catarrhal, right, slight; deviated nasal septum; naso-pharyngitis, chronic. As a result of a special Neuro-Psychiatrical examination on this same date, it was diagnosed that Patryas was psychoneurosis, neuresthenia with mild anxiety features on an inadequate personality basis; prognosis was favorable for ultimate adjustments.

There was offered and received in evidence Plaintiff's Exhibit No. 11, which was the report of a physical examination of Patryas made on May 19, 1925, in which it was found, as a result of a general physical examination, "general physical findings insufficient to account for physical complaints except on a functional basis." On this same day Patryas was given a Neuro-Psychiatrical examination in which the diagnosis was made "constitutional inferiority with hysterical manifestations." A special chest examination was made with the diagnosis chronic bronchitis and chronic fibrous pleurisy. As a result of an eye, ear, nose, and throat examination a
42 diagnosis was made of chronic catarrhal otitis media right ear; eczema canal right ear.

There was offered and received in evidence Plaintiff's Exhibit No. 12, which was the report of an examination of Stanley J. Patryas on August 27, 1926, in which a diagnosis was made of psychoneurosis hysteria, and also suppurative otitis media, right, with nerve deafness.

There was offered and received in evidence Plaintiff's Exhibit No. 13, which was the report of a physical examination dated June 27, 1927, made by the United States Veterans Bureau in which the diagnosis was chronic mastoiditis right; nerve deafness bilateral. As a result of a special Neuro-Psychiatrical examination on the same day, the diagnosis was made of Constitutional psychopathic inferior, Mild Hysterical manifestations of Hypochondriacal nature.

There was offered and received in evidence Plaintiff Exhibit No. 14, being a report of a physical examination of Patryas dated August 22, 1927, in which the general physical examination showed negative findings except that as to the eye, ear, nose, and throat findings there was a diagnosis made of chronic otitis media, suppurative, right; and congestion of the middle turbinate, left ear. As a result of a Neuro-Psychiatrical examination made on that day a diagnosis was made of hysteria, moderately severe; and in the opinion of the ex-

aminers further hospitalization in all probability will not benefit his neuropsychiatric disability.

43 There was offered and received in evidence Plaintiff's Exhibit No. 15, which was a report of a Board of Medical Officers for the purpose of examining all patients prior to discharge to determine whether such discharge was to be recommended, which report is dated September 30, 1927. In this report it was recited that the patient was admitted to the hospital July 3, 1927 from the Chicago Regional Office with the diagnosismastoiditis, right, this being a re-admission. He previously had been discharged September 28, 1924. Following complete examination his disabilities were diagnosed as: (1) Otitis media, chronic, suppurative, right, with cholesteatoma; (2) Otitis media, chronic, suppurative, left, quescent; (3) Hysteria, moderately severe; (4) Absence acquired teeth 6, 12, 13, 14, 19, 24, 25, 30; (5) Caries, teeth 10, 31. Sequelae; deafness, right post-operative. Patient received an operation July 19, 1927 at which time a right radical mastoidectomy was performed with good results. The wound is completely healed and the condition greatly improved. A complete deafness on this side exists, however, as a sequel to the operation. No treatment is recommented for his hysteria and the indicated dental treatment is not recommended as it cannot be considered as adjunct to the disability for which hospitalized. No further treatment is indicated for his ear condition, and discharge is recommended as having reached maximum benefit.

44 There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 16, dated October 10, 1927, which was a supplemental examination to the report of August 22, 1927. Diagnosis Chronic otitis media, suppurative, right; chronic otitis media, suppurative, right, quiescent; deafness, right ear, postoperative; disability 50 percent. Diagnosis on admission, Mastoiditis right. This examination also repeats the diagnosis made in Plaintiff's Exhibit No. 15.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 17, being a report of an X-Ray consultation on Mastoids in which it was said "both mastoid areas present shadows that are at variance to the normal. There appears to be a sclerosis of the upper portion of the right mastoid, but the underlying structure seems more transparent than normal, with no definite cell outlines visible. I would regard this as evidence of pathology. The left mastoid area shows a few small cells and several large ones. Whether this is an indi-

vidual variation or represents the effects of disease, caries, and absorption is questionable."

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 18, which was a report of a Neuropsychiatric examination of Patryas dated August 8, 1928, in which the diagnosis was made of Psychoneurosis, hysteria with organic factors, severe.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 19, which was a report of a physical examination of Patryas made on April 4, 1929, in which a diagnosis was made of constitutional psychopathic inferiority with
45 egocentric trends.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 20, being a report of a Neuropsychiatric examination of Patryas on April 4, 1930, in which a diagnosis of Phychoneurosis, hysteria with organic factors, was made.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 21, being a report of an examination dated May 6, 1930, in which, as a result of a general physical examination, a diagnosis was made of deafness, nerve, right ear; cicatrix, P. O. Mastoid; otitis media, chronic right ear supperative; perforation left drum membrane. As a result of a special Cardio-Vascular examination, a diagnosis was made of no Cardio-Vascular Disease found, and with a normal heart. As a result of a special chest examination a diagnosis was made of bronchitis, chronic, mild. As a result of a Neuropsychiatric examination a diagnosis was made of hysteria, moderate, phychoneurosis with organic factors on a Constitutional Phychopathic Inferiority basis.

There was offered and received in evidence PLAINTIFF EXHIBIT NO. 22, which was a report of a physical examination made on August 29, 1930, in which a diagnosis was made of hysteria, tentative; deafness, complete, right ear; deafness, moderate, left ear; acute mastoiditis not found. As a result of a Neuropsychiatric examination made September 11, 1930, a diagnosis was made of hysteria, moderate, with organic
46 factors on a constitutional psychopathic inferiority basis.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 23, being the report of a Neuropsychiatric examination made June 29, 1931, in which diagnosis was made Hysteria, moderate, with organic factors on a constitutional phychopathic inferiority basis.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 24, being a report of a Neuropsychiatric examination dated December 7, 1932, in which the diagnosis was made Hysteria, moderate, with organic factors on constitutional phychopathic inferiority basis.

There was offered and received in evidence PLAINTIFF EXHIBIT NO. 25, being a report of an examination under date of July 28, 1933, in which a diagnosis was made of no general disability. From a report of a Special ear, nose and throat examination diagnosis was made of deafness, complete right. Cicatrix, mastoidectomy, right. As a result of a Neuropsychiatric examination a diagnosis was made of hysteria on a constitutional inferiority basis with organic factors, completely mal-adjusted.

47 ALBERT SCHUTTENMAHIER, called as a witness on behalf of the plaintiff, bestified as follows:

Lives at 1237 Cleaver Street and is a metal polisher employed by Crane and Company. Knows the plaintiff Stanley Patryas since 1913. Before going into the army Patryas was in excellent health. After both he and Patryas went into the army and came back, he did not see Patryas again until 1925. Patryas lived across the street from him. When he saw Patryas in 1925 was not able to recognize him. The difference was in his looks and in his mind, and it seemed something was wrong with him, something was ailing him badly. Patryas' words were not right. He couldn't speak words and he had a terrible smell. Patryas' tongue was twisted and he was nervous. He looked poorly in 1925 compared with when he went in the army, and was lacking in weight. Around 1925 visited Patryas in his home. Patryas was nervous at this time. Patryas' wife sent their children over to his house to tell him to come over, and when he arrived there Patryas' mind was out of control. Patryas' mouth was open, and he was vomiting, and he could not stand to look at him. After that he saw him two or three months later. Patryas was preparing to go to Hines Hospital, but he was not quite so nervous. In another few months in the year 1926, Patryas was downhearted, but he didn't ask Patryas what the trouble was.

48 Following this meeting he saw Patryas about every week along the street. In about 1929 Patryas moved away from that street. Patryas moved to Eddy Street in 1931, so

that from 1926 until 1931 he did not see Patryas. In 1931 he went to see Patryas at his home in Eddy Street. He rapped at the door and Mrs. Patryas came out. He saw Patryas, who did not act right. Patryas was telling him this and that, and how he would like to go here and there, and he was kind of excited and nervous with himself. He spent four or five hours during his visit on Eddy Street. They sat on the porth for a while and he noticed it was getting on Patryas' nerves talking about things, and left, because it was getting on Patryas' nerves. Patryas was underweight at the time. Between 1925 and 1931 he looked much worse. He was weaker. What the matter with him was that he would start to say something and would change his mind and start to say something and would not finish. After 1931 up to the present he saw Patryas' five or six times at his house. He didn't seem to care about anything he sees. Patryas would ask him this and that, and when he would have something to say, Patryas would get a spell over him and all of a sudden Patryas would quit. Between 1931 and the time of testifying Patryas couldn't stand much noise. He would make his family sit quiet, keep the boys quiet and give him his best, because the least little noise, Patryas would holler. It would make him nervous and he would be through. Patryas can't stand noise. So he went over to Patryas' house to take his mind off things. Occasionally they went out for a walk.

49 They would walk three or four blocks or maybe half an hour or three-quarters of an hour. Patryas would begin puffing and get tired and then they would go home. After a while his looks would change. Patryas's eyes and nervousness would come to him and he couldn't come to a condition. Around the family Patryas was always cursing. Between 1925 and 1931 Patryas never went out for a walk alone. During 1925 and 1926 Patryas did not work at all. Patryas didn't try to do anything. In 1931 Patryas complained of headaches, would be unconscious. There wasn't any life in him. This lasted about an hour or three-quarters of an hour. When they went out for a walk in 1931 things didn't look right to Patryas, and he wondered why people stared at him, and his looks would change. That is, the expression on his face changed, and his color changed and he became pop-eyed. They would go out for a walk and he would hold Patryas up, when he would get a sweating spell. This was in 1933. He mistreated his wife and children, told them to be quiet because they disturbed him, and he chased them away.

Cross-Examination.

The fits of unconsciousness which he observed were in Patryas' home on two or three occasions. He was called in by Patryas' children and Patryas was unconscious. When he got there Patryas was vomiting and couldn't be helped. He stood there and looked and then walked out. Didn't know
50 whether to go somewhere for help or not. After observing this he turned around and walked home. The second fit of unconsciousness was in Patryas' home while he was visiting him. When the feeling came over Patryas he went over and laid down on the bed. His hands were white and pale. Patryas remained unconscious for an hour. Didn't run away this time, just stood there and looked at him. All of the things that he testified to existed from 1925, that is, the unconscious fits and his general poor health. His apparent weakness and fits of unconsciousness all existed from 1925.

51 JOSEPH F. KONOPA, called as a witness on behalf of the plaintiff, testified substantially as follows:

Joseph Konopa is a physician and surgeon and lives at 1057 North Hoyne Avenue with offices at 1628 West Division Street. Has been a physician and surgeon in Chicago for about 20 years. Is a graduate of Loyola University, and attending physician at St. Mary's Hospital and the Lutheran Deaconess Hospital. Is in the general practice of medicine. Became acquainted with the Patryas family in 1929, and has been continuously in touch with him since as family physician. Examined the plaintiff Mr. Patryas in the Fall of 1929 in his office. Gave him a superficial examination. He was very nervous, suffering from various nervous conditions, and it looked as though there was some mental condition. At times he would answer and at times he would not. He would not know what the doctor said. As a result of his examination he made a diagnosis of "some mental condition." He was somewhat mentally impaired at the time. In going over the chest he found Patryas had a heart condition. At times his heart would be rapid, at some time slow, and at times it would be skipping beats. Also his pulse showed some reaction of the heart, and he was suffering at the time. There was loss of weight. He was anemic, emaciated, and running temperature, and he concluded there might be some pulmonary tubercu-

losis. After this examination saw Patryas once or twice a month after 1929, both at the doctor's office and at Pat-
52 ryas' home. During these occasions at times Patryas acted like a good man, and at times he would be running up and down the rooms, and when Patryas' wife was sick in bed the doctor would ask him questions when he needed anything, and Patryas would not know what to bring him. Patryas' had another baby in 1931, and when visiting his wife, the doctor also observed Patryas, prescribed medicines for his mental condition and his nerves, and also to help him sleep. Again in 1933 Mrs. Patryas had a miscarriage, and Patryas would frequently call at his office, and once he took him over to the hospital and had X-rays taken of his head, which showed an operation of the right mastoid, and also an infection of the left mastoid. At times Patryas would be better and at times he would be worse.

"Mr. Cross: Q. Would you say this man, from what you found wrong with him was able to do any kind of mental or physical work in 1929 or 1930 when you haw him?

"Mr. Sullivan: I renew my objection to that question, your Honor. No proper foundation has been laid, this man is not qualified; it invades the province of the jury.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. I would say so, he was unable to do any work whatsoever.

"Mr. Cross: Q. Is he able to do any kind of mental work or physical work now.

"A. None.

"Mr. Sullivan: I object to that question for the same reason, your Honor.

"The Court: The objection is overruled, and the answer may stand.

"Mr. Sullivan: Exception."

53 The doctor has had occasion to examine a great number of people afflicted with nervous and mental diseases. In examining Patryas the doctor had him take his clothes off and laid him down on his table and went over his chest with palpatation, auscultation, listened to the heart with his stethescope; took his pulse, went over the entire body while he was lying on the table. His opinion as to his nervous and mental condition he formed from the several different times he saw him from the way he behaved in his office and the way

he talked in his home. By talking he means by asking him questions and having him do things. Fro example, when the doctor was taking care of his wife, the doctor would ask Patryas to get things ready for him, and the doctor observed that he was not able to do so.

"Mr. Cross: Q. Doctor, from your examinations of him have you an opinion based upon reasonable degree of medical certainty as to whether there are any physical, aside from mental and nervous ailments that would prevent him from working, and whether or not the condition will continue?

"Mr. Sullivan: Now, if your Honor please, I want to renew my objection on the same basis. I still do not know what he found. It invades the province of the jury. He has not qualified as a vocational expert. There has been no experience or qualification of him to pass out such a conclusion. There is no testimony from the witness showing what type, if any, of disorder or disease he had, or any diagnosis he made or any physical examination that would justify him making any diagnosis.

"The Court: The objection is overruled.

54 "Mr. Sullivan: May I have an exception to your Honor's ruling?

"The Court: Yes, certainly.

"The Witness: I would say he is not able to work physically, unable physically.

"Mr. Cross: Q. Have you an opinion based upon reasonable medical certainty whether or not this man by reason of nervousness and mental disease was able to do any kind of work, any kind of work, either physical or mental?

"Mr. Sullivan: I object to that question for all the reasons that I stated.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. Well, I will say he is unable to do any work now whatsoever.

"Q. How about 1930 and 1931?

"A. Well, he was unable then as far as I know, he never did work, never did any work; he was on relief, getting some help from city charity.

"Q. Have you an opinion based upon a reasonable medical certainty from your examinations of him, as to whether or not this man will improve or will not improve as the years go by, so as to be able to work?

"Mr. Sullivan: I object to that question. It is asking the doctor the prognosis of the disease.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. Well, my opinion is that his condition is bad; he may at times improve, or he will get worse, or he may remain the same; it is pretty hard to tell just what will become of the man.

"Q. Is there any likelihood he will ever be able to work at mental or physical work?

"A. I will say he never will be able to work.

"Mr. Sullivan: I ask that that be stricken.

"The Court: It may stand.

55 "Mr. Sullivan: Exception.

Cross-Examination.

Has been in practice for 20 years. Keeps some records. In this case didn't have complete records. Didn't bring the records with him. Found rales in lungs in 1929. Sometimes these rales were course and sometimes squeaking. Can determine rales by gross inspection; also with the stethoscope. In determining whether a patient has tuberculosis they make laboratory tests, one of which is a sputum examination. Didn't have this done in Mr. Patryas' case because he said he was going to the Edward Hines Hospital. The next thing the doctor does is to look for blood in the sputum. Didn't see any in Patryas' sputum. Didn't examine Pattyas' sputum. Another symptom of tuberculosis is a continued cough. Patryas coughed off and on. Another thing the doctor looks for in a laboratory test is the white cell count. In a normal person the cell count is between four and five million; and the normal is to ten or twenty million red cell counts. If a person has tuberculosis the White cell count is decreased. If a person has well advanced or moderately advanced tuberculosis the white count is reduced to and will be one or only two million. The red blood count may increase or decrease.

"Q. Now, Doctor, isn't it a fact that the white blood count in a normal person is about six to eight thousand?

"A. I believe that is what I said."

56 The next determination of tuberculosis are X-ray films. Didn't have X-rays made in this case so doesn't know what they would show. Can read the X-ray films. Another

symptom of tuberculosis is a temperature running fromm 100 to 101 at different times of the day. Didn't take Patryas' temperature at different times of day. The most important thing in tuberculosis in making the diagnosis is in getting the various temperatures, but this doctor didn't do that. Remembers that Patryas' pulse at 3 o'clock in the afternoon the first time he examined him was 100. The next time he took his pulse was ten days later, and remembers that it was in the afternoon and that his pulse was about 115. Doesn't remember the pulse of all his patients but remembers the pulse of Patryas because he knew him for so many years. Reported the case to the health department of the City of Chicago as a case of suspected tuberculosis, in 1929. He did not make a positive diagnosis at any time.

When asked what diagnosis of his mental condition he made, the doctor replied "nervous condition." Made a diagnosis of a nervous breakdown, more or less. Prescribes tonics in cases of nervous breakdowns. He usually for cases of this kind prescribes bromides and bromide tablets with a little paragoric and cascara. It is usual to prescribe medicines for any mental condition. He prescribed triple bromide for
Patryas' mental condition, and sometimes other medi-
57 cines. Also prescribed syro-bromides, which are bromides mixed with syrup, for Patryas' mental condition.

Made no special diagnosis of Patryas' heart. Merely knew it was not normal. By anemia, which he testified Patryas had, he means a poor condition of the blood, low count of the hemoglobin. But he didn't make a count of the hemoglobin because the patient said he was going to Hines Hospital for that. Has been experienced in diagnosing mental diseases on a total of ten or twelve cases a year. Never heard of the phrase "constitutional psychopathic inferior." Doesn't know whether Patryas was one or not. Doesn't even know how to go about finding out whether Patryas was a constitutional psychopathic inferior.

Redirect Examination.

Is able to tell whether a person is anemic by looking at him.

Recross Examination.

Is able to tell whether a man is anemic by looking at him without taking his blood count. That would be his sound

medical opinion. If a person came to see him and if the person looked as though he were anemic the doctor would treat him for anemia without doing anything else, but not right away.

58 STANLEY J. PATRYAS, called as a witness in his own behalf, testified as follows.

Lives at 4527 North Mobile. Does not remember how old he is. Was in the army. Enlisted in the army October 10, 1917. Before going into the army worked for Edelman & Company. Before going to France in 1918 he drove a truck in the army, and after arriving in the St. Lazaire Sector his jobs varied between driving a truck and being an assistant helper. From there he was transferred to the Verdun Sector, the Toul Sector, and the St. Mihiel front. On September 9th or 10th, 1918, there was a big drive on the St. Mihiel front which lasted for some time, and the shells were exploding around, and the sky was red and the earth was shaking and trembling. His ear started buzzing from the combustion of shell fire and injured his mastoid. He had no water to drink and nothing to eat. Returned to the United States in 1919. Didn't drive a truck after the big offensive but worked in a mess hall. Was on guard duty for a while and something went wrong with him and he was prosecuted. Was discharged July 29, 1919, at Camp Grant, and he went home. Coming home he had a stroke. Wandered around in a dazed condition and got lost in Lincoln Park. After that he went to work for the Northwest Terra Cotta Company in 1920, May 12th, as a finisher. Continued to work there until August, 1924. Just before he quit working in 1924 he was getting worse and could not keep up his work. At the time he quit working
59 in August, 1924, he was in the wash room and a dark cloud came over him. When the cloud passed away he was on the edge of the fire escape. He became frightened and wondered what was happening to him and feared he would fall off and kill himself. Grabbed the railing and was shivering. Then he was standing in an open elevator and became dizzy. Almost fell down the elevator shaft. Began screaming and started to run, and the foreman told him to go home. Told him to come back when he was fit to work. He was married then. Got married in 1921. After that day

in August, 1924, when he went home from the Terra Cotta Company he didn't go back to work because he could not. From 1924 for the next two or three years he was under the care of different doctors, including government doctors, and in institutions. Went to the Veterans Administration and the Northwestern University clinic and the Tuberculosis Dispensary. July, 1927, he had a mastoid operation at Hines Hospital. The government doctor told him he didn't have mastoid trouble. After the mastoid operation he went home. There was no difference in his feeling after the mastoid operation than before. After the Mastoid operation he continued to have the pains in his head which he has to this day. His hands tighten up and silver streaks fly past his eyes, and white sheets appear before him. Goes out for walks with his wife, but never goes alone and never goes to see anybody.

Has lots of buzzing and head pains even to this date.
60 His chest bothers him and his heart pumps like an engine. At times his heart is very rapid and he has hot and cold flashes, and then he has pains in his gastric region. If he eats he gets cramps and it twists in his stomach and in his eyes. This latter condition has existed since service. The mastoid operation didn't help the pains in his head. When he sweeps the floor at home he gets so weak he has to lay down. When he goes to bed to sleep he has queer dreams and there is no sense in the dreams. His wife gives him things and wakes him up and tells him to stop grinding his teeth, and in his sleep he starts to burst out laughing. Can only walk a block or two without getting sick and having to go home and lie down. Doesn't know whether his oldest boy is 15 years old or not .

Cross-Examination.

After the war was over, and after he had experienced the bursting of shells he still remained in the army, and went with the army of occupation in Germany. Doesn't remember how long he remained in the army after being gassed and shell-shocked.

His signature appears on defendant's exhibit No. 1 (Defendant's Exhibit No. 1 is the Declaration of a Soldier at the time of discharge in which he stated he had no disability or suffered any impairment of health, dated July 29, 1919).

Started to work for the Terra Cotta Company May 12,
61 1920. Received 56 and 58 cents an hour. Worked there continuously until August 26, 1924, and then he quit working on account of his mental condition that came over him. He quite working there in 1924 when his condition became as it is now. There has been no improvement since that time and he has been in the same condition he is now since 1924.

He holds insurance policies with the Prudential Life Insurance Company. Defendant's Exhibit 2 bears his signature. (Reading from Defendant's Exhibit 2, which was an application for industrial insurance in the Prudential Insurance Company.) Doesn't know whether the question "What is present condition of your health?" was asked him, and whether he answered "Good." Took out two life insurance policies since September 10, 1931. Says he did not answer the question "When were you last sick?" by saying "Never serious." Did not make that answer on September 10, 1931 on an application for insurance.

His signature appears on Defendant's Exhibit No. 4 (another application for insurance). Doesn't know whether he applied for insurance again in 1935. Doesn't know whether he has two policies of insurance.

"Mr. Sullivan: Q. 'Does any physical or mental defect or vision impairment exist?'

"A. 'No.' Was that question asked you and did you make that answer on or about the 5th day of December, 1935?

"A. I do not think it was."

Doesn't know how many insurance policies he applied for on December 5, 1935. Is not paying any premiums on
62 them now. His signature appears on Defendant's Exhibit No. 5.

Since he got out of the army he has been living on his compensation, which has amounted to $115.00 a month. His wife draws money from the State of Illinois, and she draws a pension.

63 ANNA PATRYAS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Anna Patryas, the wife of Stanley J. Patryas, lives at 4527 Mobile Avenue. She married the plaintiff in 1921. Had known him about a year before their marriage. He was working at the time of their marriage at the Northwestern Terra Cotta Company. He worked regularly for this company from 1921 to 1924. In the latter part of 1924 he commenced staying at home more than he went to work. He left work entirely in August in 1924. A fellow employee brought him home and Patryas said his head hurt so bad that he found himself on the edge of the fire escape, and they went to the doctor. Didn't do any work after 1924. He would try to help with the housework but he could not do it. Patryas had a mastoid operation on July 19, 1927. Prior to that operation he complained of severe head pains and asked to be sent to the hospital. He went to the Northwestern University Clinic and then to the Hines Hospital. Constantly complained of pains in his head prior to this operation. Was in the hospital for three months and then after he came back he was up and around the house. After his mastoid operation he would get into a rage and choke her and throw things at her, and would mistreat the children. Around 1928 and 1929 went out for walks, but did not visit people, but he did not go alone. He took walks oftener in 1926 and 1927 than he did later.

64 He gets crying spells and "gets up in a fit." Mistreats the children, burns their toes, and doesn't allow them any freedom, and won't allow the radio to be played, and threatened to kill the family. He crumples up his hair and throws things. When he goes out for a walk he tires quickly and perspires, and he becomes pale, and his eyes turn black.

Cross-Examination.

Q. Mr. Patryas, your husband's illness and these things you have described to us have continued since 1924?

A. Yes.

65 DR. HAROLD S. HULBERT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Dr. Hulbert lives in Aurora, and has an office in Chicago. Graduated from Michigan Medical School in 1914. Is now on the staff of three hospitals at Aurora. Taught at Michigan for three years, and at the University of Chicago for nine years, in mental diseases. Has always specialized in mental diseases. During the world war he was a medical officer in the United States Navy. Was on the Chicago State Hospital Residence Staff. Now conducts several psychiatric clinics in mental hygiene.

Constitutional psychopathic inferior is a person who is born inferior. There are many forms. Some are suspicious, others are unstable, and they may go from one form to another. Another group of constitutional psychopathic inferiors are inadequate and unsuccessful in anything. A psychopathic inferior is an emotional and unstable sort of person. Might turn out to be a drug addict. It is easier for a constitutional psychopathic inferior to go insane than a well born person, but very few of them do go insane. A constitutional psychopathic inferior is a permanent condition.

Psychoneurosis is a condition which involves both the nervous system and the mind. Psychoneurosis with C. P. I. means that a person was poorly born, has always been under stress, and never successful, who has become hysterical following some stress which was too great for him to meet
66 or some problem too great for him to solve, and he would have physical symptoms as well as mental symptoms. A psychoneurotic condition is considered curable in a well born person, but incurable in one poorly born if he has had too many severe strains in life. Personally examined Stanley J. Patryas on the 20th of May and on the 25th of May, 1936. (The details of the examination are omitted.) From his examination he diagnosed Patryas as having some kind of organic brain disease which impairs him mentally. He is unreliable and unable to think consistently on things which the average person do. In answer to a hypothetical question in which the doctor was asked to assume as true all the facts in evidence, the doctor stated that he had an opinion that Stanley Patryas was suffering from a disability of his brain

and of his mind; that he had organic shell shock, and the sequences of it are epilepsy and diminution, and precursive epilepsy.

Q. Doctor, have you an opinion based upon a reasonable degree of medical study whether or not this hypothetical man was able in December, 1930, before or after that, after, 1927, able to do any kind of physical or mental work?

Mr. Sullivan: I object to that.

Mr. Cross: Q. (continuing) Of any kind?

The Court: He may answer.

Mr. Sullivan: Exception. It invades the province of the jury, and the Doctor is not qualified to express his particular findings in terms of work, which is a conclusion.

The Court: Overruled.

Mr. Sullivan: He is not qualified as a vocational expert.

The Court: Overruled.

A. No gainful work, he could not be self supporting.

67 Mr. Cross: Q. What is the effect of this brain condition, what is the effect of that in general on the ability of the person to work or function normally?

A. If the frontal lobes particularly are involved, then they cannot work because they are not intelligent enough to work.

Mr. Sullivan: I object to that, your Honor, for the reasons I stated.

The Court: Well, the objection is overruled. It might be sustained on a different ground, that it is not testified here, I believe, that the frontal lobes were involved in this case.

The Witness: Not while he lives can we tell.

Mr. Cross: Q. There is no way to tell that?

A. No way in which we can tell in a living man with certainty, but there are indications.

He has an opinion, however, that the frontal lobes were involved.

Q. Now, Doctor, can you state with a reasonable degree medical certainty, or rather have you an opinion based upon a reasonable degree of medical certainty whether or not this hypothetical man in 1929, 1930 or 1931 had a reasonable chance to improve and be relieved of this condition, or whether it was likely to continue?

Mr. Sullivan: I object to that question. He is asking the prognosis of the disease.

The Court: The objection is overruled.

Mr. Sullivan: Exception.

A. I have an opinion.

Mr. Cross: Q. What is your opinion?

A. It was not a condition which could be improved, that he cannot recover.

This condition will continue until changes take place; that will probable be very rigid when they occur. When the membranes of the brain, the adhesions take place, and after they contract, you may get any complication such as epilepsy, but of itself it does not lead to dementia paralysis.

68 *Cross-Examination.*

Q. So that in your judgment or in your opinion you testify the man was unable to do any work and that has been his condition since 1924 or thereabouts?

A. Yes, I do not think he could be self-sustaining.

Q. Since 1924?

A. That is my statement.

And thereupon the plaintiff rested his case in chief.

69 And thereupon, the defendant, to maintain the issues on its part, offered and introduced the following evidence, to wit:

GEORGE V. COHN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Lives at 3800 Lake Shore Drive. Superintendent of Prudential Life Insurance Company in the branch office located at 4409 Milwaukee Avenue. In response to a subpoena has produced in court Government's Exhibits A, B, and C. Has been with the Prudential Life Insurance Company for 24 years, and is familiar with its form of application.

Government's Exhibit "A" represents an industrial application for industrial insurance in the amount of $500.00. From inspecting the document he is able to say that Policy No. 8796130 was issued thereon. From looking at Government's Exhibit "B" under date of December 5, 1935, he can state that is another industrial life insurance policy in the sum of $500.00. From looking at Government "C" he can state that on December 5, 1935, another industrial life insurance policy was issued to Stanley Patryas in the sum of $500.00.

70 HENRY E. RANDOLPH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Lives at 110 South Oak Street. Is presently employed as a psychiatrist in the United States Veterans' Bureau at Hines, Illinois. Has been there a little over 13 years. Is a graduate of St. Louis College of Physicians and Surgeons, and postgraduate of the University of Michigan. Is a licensed physician and surgeon. Has specialized in mental and nervous diseases. Is chief of the neuropsychiatric service of the outpatients' department at Hines, Illinois. The term constitutional psychopathic inferior means a type of personality, an individual that is not insane or does not necessarily have any functional nervous disorders, but is a certain type of personality. That personality is characterized by unstable emotions, a weak will, and a tendency to escape light responsibilities. In medical science it is not considered a disability and is not a disease. An organic type of mental disorder means that the brain is diseased, that there is some local seat of infection. The functional type of disorder is such as hysteria, neurasthenia, and anxiety state, and there is no diseased process in the brain tissue. A constitutional psychopathic inferior is an inborn condition and is not traceable to any trauma. A constitutional psychopathic inferior is a parasite. They let someone else support them and just drift along in life.

Has no independent recollection of Stanley Patryas.

71 His signature appears on plaintiff's Exhibit 11. From inspecting the document the doctor can state he examined Stanley Patryas on the 22nd of May, 1925. At that time a diagnosis was made of constitutional psychopathic inferior with hysterical manifestations. By inspecting Plaintiff's Exhibit 21 he can state that he examined Patryas on May 6 and April 29, 1930, and made a diagnosis of hysteria on a constitutional psychopathic inferiority basis. Hysteria with organic factors, but the organic factors did not have reference to his mental condition. That was from his physical condition. On June 29, 1933, according to Plaintiff Exhibit 25 he examined Patryas and made a diagnosis of hysteria on a constitutional inferiority basis, organic factors, complete maladjustment.

Is familiar with the disease known as anemia. Could not make a diagnosis of anemia by looking at a man. It is necessary to have a blood count. The white corpuscle blood count in a normal man is between six and eight thousand. If a man had a white blood count of a million or two million he would have a disease known as leukemia, a very grave disease. Has never known a person to live for any length of time with a blood count as high as 2,000,000.

72 *Cross-Examination.*

In making a diagnosis of hysteria with organic factors as appears on Plaintiff's Exhibit 25 he meant that he had some minor physical disability. The mastoid operation did not affect his mind or nervous system. By complete maladjustment he meant that he was not making any affort to do anything for himself. Psychoneurosis means a functional nervous disorder. A constitutional psychopathic inferior becomes less efficient as he grows older. This condition is hereditary. A person might not always have the appearance of a constitutional psychopathic inferior, but may become apparently that way at the age of 25 or 30.

73 ALBERT FIELD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Lives in Downers Grove; is a physician and surgeon, having graduated from Northwestern University in 1904. Has specialized in the eye, ear, nose, and throat branch of his profession for the last 15 years. Is employed by the United States Government at Hines Hospital. Is a medical officer there. Referring to Government's Exhibit marked "D" he states that he examined Patryas on December 7, 1932, and gave him an eye, ear, nose, and throat examination. He was very deaf in the right ear, and had a post-operative mastoid scar, which was well healed at the time; no mastoid symptoms, but he had a mild ear infection in the right ear. The left ear was normal. His hearing was not impaired in the left ear, but he was hard of hearing in the right ear. He was totally deaf in the right ear. That was the same side the mastoidectomy had been performed on. He could not make a diagnosis of anemia by looking at a man. Would have laboratory tests made. Never heard of a person having a white

blood count of one or two million. There was no inflammation of the mastoidectomy scar.

74 *Cross-Examination.*

Has never seen people on the street pale and thin that doctors call anemic. Pallor does not always mean anemia. Taking the blood count is necessary to make the diagnosis. By looking at a person you can become suspicious that he has anemia, that would cause a doctor to desire to verify his judgment by examination.

75 LEON B. BOWES, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Leon M. Bowes is a physicion and surgeon for the last 33 years. On December 31, 1935, he examined Stanley Patryas. Is the examining physician for the Prudential Life Insurance Company. His signature appears on defendant's exhibit No. 5. He signed Defendant's Exhibit 5 apparently as a witness to Mr. Patryas signature and partly as a signature of the examination made. Examined the heart and lungs and the right ear. Did not find any diseases or pathological involvement of the respiratory system. No disease of the heart. The writing on Defendant Exhibit 5, "Has applicant consulted a doctor in the last three years? If yes, when and for what?" Answer: "No." That is in the doctor's handwriting, but the information was elicited from Mr. Patryas. Government's Exhibit "B", dated December 23, 1935, bears his signature. The writing thereon is in his handwriting. At that time there was no discharge from either ear. The hearing in the left ear was normal. Complete loss of hearing in the right ear. At the time the doctor examined him Mr. Patryas was not crying and was not hysterical and faint. It is his place to observe the applicant to see whether he shows any signs of any abnormal, mental, or physical condition, or any physical defects, or any sign of any illness, and in examining Mr. Patryas none of these were apparent, and he noted none.

76 *Cross-Examination.*

The examination was conducted at Patryas' home. Examined his chest with a stethoscope. Looked in his ears with

a light which he carries for that purpose. The examination was made for industrial life insurance.

Whereupon there was offered and received in evidence over plaintiff's objection Government's Exhibit "A", which is in words and figures as follows, to wit:

An application dated September 10, 1931, for $500.00 industrial life insurance with the Prudential Life Insurance Company of America, signed by Stanley Patryas, in which he stated that the present condition of his health was good; that he was never seriously ill, and that no physical or mental defect or infirmity exists.

Defendant's Exhibit "B" is an application for insurance with the Prudential Life Insurance Company dated September 5, 1925, in the sum of $500.00, in which he stated the condition of his health was good.

Defendant's Exhibit "C" dated December 5, 1935, being an application for Insurance in which Patryas stated his condition of health was good.

Whereupon, the defendant rested its case, which was all the evidence introduced by either party.

Whereupon, the defendant moved the court at the conclusion of all the evidence to return a verdict in favor of the defendant on account of the failure of the plaintiff to ad-
77 duce in his behalf substantial evidence that he became permanently and totally disabled while his contract of insurance was in full force and effect. The defendant further moved the court to direct the verdict in favor of the defendant because if there was proof of permanently and total disability; if plaintiff's evidence showed that, it existed since 1924 and the policy upon which this suit was brought did not come into being until 1927.

The Court: Well, I think I will reserve my ruling on that point that you suggest here, of disability existing prior to the issuance of this policy. I will reserve my ruling until after the verdict is returned, and then we can argue that.

Mr. Cross: As I understand, under the law the policy would not issue if he was totally and permanently disabled and defendant is estopped from raising that question.

The Court: I think I would rather take that up when we have time to argue it. You have made your motion?

Mr. Sullivan: I have made my motion.

The Court: And the court reserves its ruling until after the verdict.

Mr. Sullivan: In the event you overrule the motion I would like to have the record show an exception.

The Court: Yes. Bring in the jury.

Whereupon the Court overruled the defendant's motion for a directed verdict to which action of the court the defendant then and there duly objected and excepted.

78 Instructions of the Court.

The Court: Gentlemen, in this case there are some questions of law to be determined and some questions of fact to be determined. The question of law, the Judge has to determine; the questions of fact are for the jury to determine. The questions of fact for you to determine in this case are, whether the plaintiff is totally and permanently disabled, and if he is, at what time did that total and permanent disability commence.

I will go a little ahead of my story to say that the form of verdict submitted to you, if you find for the plaintiff, will be, that you will fill in the date when the disability became total and permanent. Those two facts you will decide. The question of the effect of those facts is for the court.

Now, this is a suit on a policy of insurance, it is a contract made by the government just as a private life insurance company makes contracts with individuals, and by this contract the government agreed to pay a certain sum of money to this plaintiff if he became totally and permanently disabled while the policy was in force, and the policy continued in force as long as he continued the making of the monthly payments. For example, if he made the September payment the policy continued in force until the 31st day of October. That is just by way of illustration.

If he became totally and permanently disabled while the policy was in force then he is entitled to recover; if not, he is not entitled to recover.

Now, what is total disability is determined by the words of the policy. It has been told to you by the lawyers that they agree on that, what total disability consists of, that is, that a person is in such condition, in such impairment of mind and body that he is not able to engage continuously and with a reasonable degree of regularity in any gainful occupation or some gainful occupation for which he is fitted.

The disability is permanent if it is reasonably certain to continue throughout the life of the individual.

Now, you have heard testimony here in this case by the witnesses and from the records as to this man's condition, and it is for you to determine from that evidence whether
79 he is totally and permanently disabled, that is, whether he is unable to engage continuously and with a reasonable degree of regularity in some gainful employment, and if you find that he is not, then you will determine whether that disability is reasonably certain to continue throughout his life.

You have heard the testimony of the witnesses. Now, you are not bound to accept anything as a fact because some witness has testified to it. You use your judgment just as reasonable men, just as you would if you were outside the jury box determining the weight to be given to the testimony of any witness who has appeared here. You make take into consideration his interest in the result of the suit, if any; his appearance on the stand; his fairness and candor; his knowledge or lack of knowledge of the matter about which he has testified, and from all those circumstances you determine what weight, that is, how much credit you will give, how far you will believe the testimony of any particular witness, and after having considered the testimony of all the witnesses in that way you make up your mind where the truth lies.

Now, in this case, as in all other civil cases the burden is upon the plaintiff to make out his case by a preponderance of the evidence. Maybe some of you have served in criminal cases and have been told that before a verdict of guilty can be found the guilt of the defendant must be proven beyond reasonable doubt. This is not a criminal case, it is a civil case, and all the plaintiff is required to do is to prove his case by the preponderance of the evidence, that is, the greater weight of the evidence. If the evidence is evenly balanced so that you cannot tell what is the truth the plaintiff has not the preponderance of the evidence, has not shown that he is entitled to recover by a preponderance of the evidence and he cannot recover. If you think in any case any witness wilfully and knowingly testifies falsely to any material fact of the case, then you may set aside the testimony of that witness entirely, or you may do so except as it is corroborated by other credible evidence in the case.

Are there any other matters that you want me to instruct the jury on?

80 Mr. Sullivan: Your Honor, I might suggest that the jury be instructed as to the dates of this policy.

The Court: Yes, that is right, the policy.

Mr. Cross: I think they should be also instructed at the same time this is a converted policy of the former policy and really a continuation of the policy, and it is only necessary for the jury to find that he was permanently and totally disabled at the time he made demand and proof of total permanent disability.

The Court: Well, I am not going to instruct on that because I have instructed the jury to find the dates the disability occurred and I will take care of whatever question arises.

Under the policy the last premium was paid when?

Mr. Lytle: May 1932.

The Court: May 1932?

Mr. Sullivan: The policy became of no force or effect June 1st, 1932.

The Court: Now, if the plaintiff is totally disabled but became totally and permanently disabled after June 1st, 1932, then he cannot recover.

Mr. Sullivan: May I request an instruction that if they find he became totally and permanently disabled—

The Court: I am simply instructing the jury to fix the dates, that is the question.

The jury will fix the dates. If you find the date the plaintiff became totally and permanently disabled, if it was after June 1, 1932, of course, he cannot recover because the policy lapsed then, unless he was totally and permanently disabled on June 1st, 1932, he was not required to make any further payments, but if he was not permanently and totally disabled then and made no further payment, as he did, the policy would lapse.

If you find for the plaintiff your form of the verdict will be:

We, the jury, find the issue for the plaintiff and fix the date of his permanent and total disability at ....., and you can fix the time when he became totally and permanently disabled.

If you find for the defendant the form of the verdict will be:

We, the jury, find the issue for the defendant.

Whichever form of verdict you find will be signed by your foreman, whom you will select when you retire, and by the other eleven members of the jury.

81 Mr. Sullivan: Your Honor, before the jury retires may I make a request?

The Court: Yes.

Mr. Sullivan: I request that you instruct the jury that the plaintiff must show that he became totally and permanently disabled during the life of the policy, and that if he became permanently and totally disabled before July 27th, 1927, he is not entitled to a verdict.

The Court: I haven't had an opportunity to study the policy. I am going to ask them to simply fix the date.

Mr. Sullivan: May I make my record on that?

The Court: Yes, I can hear you when I have an opportunity to read the policy.

Are the exhibits all ready?

Mr. Cross: I think they are all here, at least ours are.

The Court: The bailiff will be sworn.

(Bailiff sworn.)

The Court: Now, gentlemen, you may retire with the bailiff.

Thereupon the jury returned a verdict into open court reading: "We, the Jury, find the issues for the plaintiff, and fix the date of permanent and total disability at the latter part of 1924."

Signed: Foreman, and eleven other jurors.

Thereupon the Court overruled the defendant's motion theretofore made for a directed verdict and findings of fact and conclusions of law to which the defendant then and there duly excepted.

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and includes all of the evidence and proceedings had at the trial, and is hereby settled, signed and sealed in open court and made a part of the record in this cause this 14th day of Nov., 1936.

This is to certify that from time to time the term of court was properly extended herein, for the purposes of settling, signing, and filing the foregoing bill of exceptions.

William H. Holly,
William H. Holly,
District Judge.

No Objection.
Cross & Cross,
by Stephen A. Cross.

84 And on, to wit, the 12th day of September, 1936 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Petition For Appeal in words and figures following, to wit: Filed Sept. 12, 1936.

85 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—40340) * *

PETITION FOR APPEAL.

Now comes the United States of America by Michael L. Igoe, its attorney for the Northern District of Illinois, and feeling itself aggrieved by the final judgment entered in this cause on June 18, 1936, prays that the Court may allow the United States of America to perfect an appeal to the United States Circuit Court of Appeals for the Seventh Judicial Circuit.

Respectfully submitted,
M. L. Igoe,
Michael L. Igoe,
United States Attorney.

86 And on, to wit, the 12th day of September, 1936, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Assignment Of Errors in words and figures following, to wit:

87 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—40340) * *

ASSIGNMENT OF ERRORS.

Now comes the defendant herein, the United States of America, by Michael L. Igoe, its attorney for the Northern District of Illinois, and in connection with its petition for appeal presents this, its assignment of errors, in accordance with the rules relating thereto, and says that in the trial of the above entitled cause and in the records, proceedings and

judgment manifest error has intervened to its prejudice as follows:

1. The Court erred in failing and refusing to instruct the jury at the conclusion of all the evidence to return a verdict for the defendant on account of the failure of the plaintiff to adduce substantial evidence in his behalf that he became totally and permanently disabled during the contract of insurance sued upon.

2. The Court erred in failing and refusing, at the request of the defendant's counsel, to instruct the jury that if they found from the evidence that the plaintiff became totally and permanently disabled prior to June 27, 1927, the date of the issuance of the policy sued upon, that they should return a verdict for the defendant.

88 In connection with this assignment, the following occurred at the trial:

"Mr. Sullivan: Your Honor, before the jury retires may I make a request?

"The Court: Yes.

"Mr. Sullivan: I request that you instruct the jury that the plaintiff must show that he became totally and permanently disabled during the life of the policy, and that if he became permanently and totally disabled before July 27th, 1927, he is not entitled to a verdict.

"The Court: I haven't had an opportunity to study the policy. I am going to ask them to simply fix the date.

"Mr. Sullivan: May I make my record on that?

"The Court: Yes, I can hear you when I have an opportunity to read the policy."

3. The Court erred in permitting plaintiff's witness Konopa to testify over the objection and exception of the defendant as follows:

"Mr. Cross: Q. Would you say this man, from what you found wrong with him was able to do any kind of mental or physical work in 1929 or 1930 when you saw him?

"Mr. Sullivan: I renew my objection to that question, your Honor. No proper foundation has been laid, this man is not qualified; it invades the province of the jury.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. I would say so, he was unable to do any work whatsoever.

"Mr. Cross: Q. Is he able to do any kind of mental work or physical work now?

"A. None.

"Mr. Sullivan: I object to that question for the same reason, your Honor.

"The Court: The objection is overruled and the answer may stand.

"Mr. Sullivan: Exception.

"Q. Doctor, from your examinations of him have you an opinion based upon reasonable degree of medical certainty as to whether there are any physical, aside from mental and nervous ailments that would prevent him from working, and whether or not the condition will continue?

"Mr. Sullivan: I object to that question. It invades the province of the jury. The witness is not qualified as a vocational expert, and has no experience or qualification to pass out such a conclusion.

"The Court: The objection is overruled.

"Mr. Sullivan: May I have an exception to your Honor's ruling?

"The Court: Yes, certainly.

"Mr. Cross: Q. Do you understand the question, doctor? Aside from his mental and nervous complaints what is your opinion as to whether or not from his purely physical disabilities he would be able to work at anything?

"Mr. Sullivan: I object to that question.

89 "The Witness: I would say he is not able to work physically, unable physically.

"Mr. Cross: Q. Have you an opinion based upon reasonable medical certainty whether or not this man by reason of nervousness and mental disease was able to do any kind of work, any kind of work, either physical or mental?

"Mr. Sullivan: I object to that question for all the reasons that I stated.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"The Witness: A. Well, I will say he is unable to do any work now whatsoever.

"Q. Is there any likelihood he will ever be able to work at mental or physical work?

"A. I will say he never will be able to work.

"Mr. Sullivan: I ask that that be stricken.

"The Court: It may stand.

"Mr. Sullivan: Exception."

4. The Court erred in permitting Dr. Hulbert, called as

a professional expert for the plaintiff, to testify over the objection and exception of the defendant as follows:

"Q. Doctor, have you an opinion based upon a reasonable degree of medical study whether or not this hypothetical man was able in December, 1930, before or after that, after 1927, able to do any kind of physical or mental work?

"Mr. Sullivan: I object to that.

"The Court: He may answer.

"Mr. Sullivan: Exception. It invades the province of the jury, and the Doctor is not qualified to express his particular findings in terms of work, which is a conclusion. He is not qualified as a vocational expert.

"The Court: Overruled.

"No gainful work, he could not be self supporting.

5. The Court erred in not holding as a matter of law that the plaintiff was not able to recover in this case because all of his evidence, if taken to be true, and if amounting to permanent and total disability, indicated that the plaintiff was permanently and totally disabled before the existence of the policy sued upon.

90 6. The Court erred in failing and refusing to hold as a matter of law at the request of the defendant that there was no substantial evidence that the defendant was permanently and totally disabled at any time.

Wherefore, the defendant, the United States of America, prays that the said judgment of the said District Court of the United States may be reversed and substantial justice done to the parties.

UNITED STATES OF AMERICA,
By M. L. Igoe,
Michael Igoe,
United States Attorney.

91 And afterwards, to wit, on the 12th day of September, 1936, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

92 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Sept 12, 1936.
* * (Caption—40340) * *

ORDER ALLOWING APPEAL.

This cause coming on to be heard upon the petition of the United States for an order of court permitting it to appeal from the final judgment in this cause,

It Is Hereby Ordered, Adjudged and Decreed that the appeal be, and the same is, hereby allowed.

Enter:

BARNES,
Judge.

Dated at Chicago, Illinois, this 12th day of September, A. D. 1936.

82 And afterwards, to wit, on the 12th day of September, 1936 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

83 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—40340) * *

ORDER.

This cause coming on to be heard on the motion of the defendant herein, the United States of America, for additional time to sign, settle and file the bill of exceptions in this cause and for additional time to file a transcript of record with the Clerk of the United States Circuit Court of Appeals,

Now, Therefore, It Is Ordered, Adjudged and Decreed that the time for settling, signing and filing the bill of exceptions be, and the same is, hereby extended to and including the 18th day of November, A. D. 1936, and the time for filing the transcript of record with the Clerk of the United States Circuit Court of Appeals is extended to and including the 27th day of November, A. D. 1936.

Enter:

BARNES,
Judge.

Dated at Chicago, Illinois, this 12th day of September, A. D. 1936.

Nov. 23, 93 And on, to wit, the 23rd day of November, 1936, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Praecipe in words and figures following, to wit:

94 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

PRAECIPE.

To: Henry W. Freeman, Clerk of the U. S. District Court, for the Northern District of Illinois.

Kindly prepare for additional use in connection with the appeal in the above entitled cause the following orders and documents entered and filed of record:

Petition & Notice dated January 16, 1932,

Copy of Ans. dated May 11, 1936,

Order and copy of amended petition, dated April 14, 1936,

Order reserving ruling on motion for directed verdict, dated May 28th,

Copy of verdict dated May 29, 1936,

June 13, 1936—Overruling defendant's motion for judgment on verdict—90 days Bill of Exceptions,

Copy of judgment dated June 18, 1936,

September 12, 1936—allowing appeal and all orders and papers and time for filing Bill of Exceptions and filing record,

Copy of Bill of Exceptions dated November 14th,

Copy of this Praecipe.

Michael L. Igoe,
United States Attorney.

95 Northern District of Illinois } ss:
Eastern Division }

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Stanley J. Patryas *vs.* United States of America No. 40340

as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 27th day of November, A. D. 1936.

Henry W. Freeman,
Clerk,

(Seal)

96 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

CITATION.

The President of the United States, to Stanley J. Patryas and Stephen A. Cross, His Attorney, Greeting:

You Are Hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to order allowing appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, Eastern Division, and you are ordered to show cause, if any there be, why the judgment against the United States of America should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Judge of the United States District Court of the United States, this 12th day of September, A. D. 1936.

John P. Barnes,
United States District Judge.

Service of the above and foregoing citation is hereby acknowledged and accepted for Stanley J. Patryas, plaintiff, this 12th day of September, A. D. 1936.

Stephen A. Cross.

At the October Term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court House in the City of Chicago on the Sixth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirty-Six, and of our Independence the One Hundredth and Sixty-First.

6101

THE UNITED STATES OF AMERICA, APPELLANT

vs.

STANLEY J. PATRYAS, APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And on, to wit, the 12th day of May 1937, the following proceedings were had and entered of record:

Wednesday, May 12, 1937

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. WALTER C. LINDLEY, *District Judge*

6101

THE UNITED STATES OF AMERICA

vs.

STANLEY J. PATRYAS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Keith L. Seegmiller, counsel for appellant, and by Mr. Stephen A. Cross, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards on, to wit, the 21st day of June 1937, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 6101. October Term, 1936—April Session, 1937

THE UNITED STATES OF AMERICA, APPELLANT

v.

STANLEY J. PATRYAS, APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

June 21, 1937

Before EVANS and SPARKS, Circuit Judges, and LINDLEY, District Judge

Stanley J. Patryas entered the military service of the United States in 1917 and was honorably discharged July 29, 1919. During his service there was issued to him a war risk insurance policy for the sum of $10,000 which remained in full force during the period of his service. Upon his discharge he ceased to pay the premiums due thereon and the policy lapsed on August 1, 1919. The policy was reinstated on July 1, 1927, and immediately converted into a so-called Government five year converted term policy. All premiums were paid thereon up to and including the month of January 1932. When the original policy was reinstated all back premiums were paid by the imposition of a lien against said policy in the sum of $773.90.

A claim for disability benefits under the converted policy was filed early in 1931. Action was instituted on January 15, 1932. No further premium payments were made on the converted policy after January 1932. Appellee sought recovery of $57.50 per month from July 1, 1930. The recovery was limited to a date not exceeding six months prior to the date of making claim for total and permanent disability payments which in this case was January 1931.

The policy, following the statute, contained an incontestable provision excepting only fraud and non-payment of premiums. The policy was not inserted in the bill of exceptions and is not before us. The appellant denied that the insured was at any time totally and permanently disabled. At the close of the trial it moved for a directed verdict on two grounds: (a) That permanent and total disability was not established; and (b) if it existed, it went back to a date prior to the issuance of the converted policy. The case was submitted to a jury who found that the date of the insured's permanent and total disability was the latter part of 1924.

The court entered judgment for appellee for $3,737.50, being the accrued monthly installments at the rate of $57.50 per month from January 25, 1931, to May 25, 1936, less $1,198.49, which represented the lien created against the policy ($773.90) together with interest thereon from July 1, 1927, to June 18, 1936, at 5 percent.

EVANS, Circuit Judge: Appellant challenges the judgment solely on the ground that the insured became totally and permanently disabled in the latter part of 1924, which was before the issuance of the converted five year policy. Its position is that the policy which was sued upon did not cover payments for total and permanent disability which occurred prior to the issuance of the policy.

The Government raises no fact question—that is, it does not here question the totality and permanency of the insured's disability. The record probably justifies this position and would support such a finding by court or jury. It is not the clearest imaginable case of total disability, although tolerably plain on the permanency of the disabilities. Appellee's condition might well be said to be congenital. Mental limitations and mental disturbances are, so the record indicates, back of the physical weaknesses. It is not quite clear how he was ever accepted for military service. The Government was fully informed of the insured's condition at the time his insurance was reinstated. Insured was at the time in the hospital, receiving free treatment from the Government. When the affliction from which he was obviously suffering rose to the total and permanent disability stage may well be said to be a disputed issue of fact. Even when the claim of disability was filed in 1931, it was denied by the Department on the ground that insured was not totally and permanently disabled. Later, when this action was begun, the appellant, in its answer, denied the totality and permanency of the disability. It was only after the trial and the jury found that the total and permanent disability existed as far back as 1924 that the Government took the position that liability was there avoided.

The Government has collected numerous cases which hold that there can be no recovery under the total and permanent disability clause of a converted policy where it is shown that such disability occurred prior to the issuance of the converted policy.[1] It may be said, however, that the decisions are not unanimous.[2]

Notwithstanding the weight of the authority to the contrary, we are unable to give to the incontestable clause the construction which would deny a right to recover in all cases where upon trial a jury finds that the total and permanent disability existed prior to the issuance of the converted policy.

Not only is there an incontestable clause which confronts the Government but there are facts which establish an estoppel.

In the instant case there was no avoidance of the incontestable clause on the ground of non-payment of premium or because of fraud. If the evidence indicated that the insured had defrauded the Government or the total and permanent disability was concealed, we would have a materially different case from the one before us.

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[1] *Hicks* v. *U. S.*, 65 F. (2d) 512 (C. C. A. 4); *U. S.* v. *Kaminsky*, 64 F. (2d) 735 (C. C. A. 5); *U. S.* v. *Stevens*, 64 F. (2d) 853 (C. C. A. 8); *U. S.* v. *Molver*, 77 F. (2d) 208 (C C. A. 4); *Davis* v. *U. S.*, 57 F. (2d) 871 (D. C. Va.); *Jordan* v. *U. S.*, 36 F. (2d) 43 (C. C. A. 9); *Anderson* v. *U. S.*, 36 F. (2d) 45 (C. C. A. 9); *Bolger* v. *U. S.*, 60 F. (2d) 560 (D. C. Mass.); *Schmidt* v. *U. S.*, 63 F. (2d) 390 (C. C. A. 8).

[2] *U. S.* v. *Chandler*, 77 F. (2d) 452.

Here the Government was better informed of the state of the physical and mental condition of the insured than Patryas was himself. The Government had a difficult situation to deal with. Not only was there doubt about the elapse of the original war risk policy written during the insured's services but there were anxieties over the moral obligation which the Government has so willingly and generously assumed toward all the world war veterans. It was in the face of this situation, the facts of which were well known to the Government, that the insured, who occupied somewhat the status of a ward, was advised to apply for and secure reinstatement of the old war risk insurance policy. The ward consented to the payment of all premiums he had failed to pay since his discharge from service, through the imposition of a substantial lien against the reinstated policy. In fairness to appellant it should be said that it did not concede permanent and total disability to exist at this time. Neither did the appellee assert such a condition, assuming he was able to make an intelligent election. After the reinstatement took place the insured, again apparently acting upon the advice of the Government, surrendered this insurance and took out the five year converted insurance policy.

These facts are hardly consistent with the Government's present position, which denies all liability under the converted policy for total and permanent disability alleged to exist at the time the policy was executed.

They were inconsistent with its present position. If appellee were totally and permanently disabled when he was discharged (a controverted issue), he was not required to pay premiums during such disability. His old policy was then in full force, and disability payments were due under it. Insured waived his right to claim such benefits and in return the Government reinstated the policy. The insured also waived his right to assert the absence of premiums due and consented to the creation of a lien equal to such premiums. The Government was again the gainer. To permit it to take advantage of the insured's waivers, and then repudiate liability under its contract would be unjust. It is estopped from so doing.

Moreover, we are unable to understand why the incontestable clause is not binding upon appellant. We have recently had occasion to construe an incontestable clause in two cases involving policies written by private insurance companies.[3] An incontestable clause in a policy written by the Government must be construed the same as one written by private insurance companies. The word "incontestable" means incontestable. Its meaning is well understood when used in life insurance contracts.

Exceptions to incontestable provisions may be made and if they appear in the policy will be given effect. Courts, however, can not add exceptions and thereby defeat the well understood meaning of the word "incontestable."

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[3] *Service Life Ins. C. v. Weinberg*, 81 F. (2d) 359; *State Mutual Life Ins. Co. v. Stapp*, 72 F. (2d) 142.

In the present case two exceptions to the incontestable clause were made. Neither is involved here. We are therefore at a loss to understand why the recovery should be defeated because the condition of the insured's health and mentality at the time the policy was written indicated the possibility, and in fact the likelihood, of early liability arising under the contract.

It is worthy of note that the risk did not cover disabilities existing prior to the date of the policy. This policy covered future total and permanent disability benefits—monthly disability payments accruing after, not before, the issuance of the policy. It was known, of course, to both sides that one might be suffering from physical afflictions and ailments which could grow better as well as worse. Insurance necessarily deals with the future, the uncertainties of which are known to and may be discounted or anticipated by both insurer and insured. We are unwilling to adopt a construction of an incontestable clause as applied to disability liabilities such as here urged by appellant.

There exists another reason for affirmance of this judgment. The record does not contain the policy and appellant's ground for a directed verdict is the absence of any evidence which would justify a recovery. We are not making the failure of appellant to include all the evidence in its bill of exceptions the sole basis of our decision, however, for we assume that the statute defines and fixes the incontestable provisions of the policy in question.

Affirmed.

And on the same day, to wit, the 21st day of June 1937, the following further proceedings were had and entered of record:

Monday, June 21, 1937

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge

6101

THE UNITED STATES OF AMERICA

vs.

STANLEY J. PATRYAS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment in the said District Court in this cause be and the same is hereby affirmed.

And afterwards on, to wit, the 13th day of July 1937, the mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 7, inclusive, contain a true copy of the papers filed and proceedings had (excepting appearances of counsel, stipulation for extension of time, and briefs of counsel) in the case of The United States of America *vs.* Stanley J. Patryas, No. 6101, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 10th day of September, A. D. 1937.

[SEAL]

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	8
Reasons for granting the writ	9
Appendix	19

CITATIONS

Cases:

Birmingham v. *United States*, 4 F. (2d) 508	16
Denver v. *Home Savings Bank*, 236 U. S. 101	18
Earwood v. *United States*, 294 U. S. 695	4
East St. Louis Cotton Oil Co. v. *Skinner Bros. Mfg. Co.*, 249 Fed. 439	18
Filor v. *United States*, 9 Wall. 45	16
Flannagan v. *Provident Life & Accident Ins. Co.*, 22 F. (2d) 136	12
Hearin v. *Standard Life Ins. Co.*, 8 F. (2d) 202	12
Hicks v. *United States*, 65 F. (2d) 517	11
Lee v. *Munroe*, 7 Cranch 366	16
Mack v. *Connecticut General Life Ins. Co. of Hartford*, 12 F. (2d) 416, certiorari denied, 271 U. S. 687	11
Pine River Logging Co. v. *United States*, 186 U. S. 279	16
Sanders v. *Jefferson Standard Life Ins. Co.*, 10 F. (2d) 143	11
Service Life Ins. Co. v. *Weinberg*, 81 F. (2d) 359	12
State Mutual Life Ins. Co. v. *Stapp*, 72 F. (2d) 142	12
Sutton v. *United States*, 256 U. S. 575	16
United States v. *Arzner*, 57 F. (2d) 488, 287 U. S. 470	14
United States v. *Chandler*, 77 F. (2d) 452	12
United States v. *Bernays*, 158 Fed. 792	18
United States v. *Kaminsky*, 64 F. (2d) 735	11, 12
United States v. *Loveland*, 25 F. (2d) 447, 278 U. S. 665	16
United States v. *McIver*, 77 F. (2d) 208	11
United States v. *McPhee*, 31 F. (2d) 243	18
United States v. *Madigan*, 300 U. S. 500	14
United States v. *Mathis*, 84 F. (2d) 451	11
United States v. *Meyer*, 76 F. (2d) 354	11
United States v. *Stevens*, 64 F. (2d) 853	11
Utah Power & Light Co. v. *United States*, 243 U. S. 389	16
Wilber Nat. Bank v. *United States*, 294 U. S. 120	16
Wright v. *Philadelphia Life Ins. Co.*, 25 F. (2d) 514	12

Statutes:	Page
Act of October 6, 1917, sec. 2 (c. 105, 40 Stat. 398, 409–410)	19
Section 400	19
Section 401	19
Section 402	20
Section 404	21
Section 300, World War Veterans' Act, 1924	23
Section 301, World War Veterans' Act, 1924	23
Section 304, World War Veterans' Act, 1924	24
Section 307, World War Veterans' Act, 1924	25
Section 307, World War Veterans' Act, 1924, as amended by the Act of July 3, 1930 (c. 849, sec. 24, 46 Stat. 1001–1002)	25
Miscellaneous:	
Bulletin No. 1, Treasury Department, October 15, 1917	21

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 445

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY J. PATRYAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 21, 1937.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 57–60) is reported in 90 F. (2d) 715.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 21, 1937. (R. 60.) The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a suit for disability benefits under a contract of United States Government life insurance, the Government is liable where it is shown that total permanent disability occurred prior to the reinstatement and conversion of the insurance.

2. Whether the Circuit Court of Appeals erred in holding (if it did so hold) that the omission of portions of the policy from the bill of exceptions precluded consideration of the Government's motion for a directed verdict.

3. Whether, in any event, the judgment of the District Court should not have been reversed by the court below upon the record proper, apart from the bill of exceptions.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved are printed in the Appendix, *infra,* pp. 19–26.

STATEMENT

Stanley J. Patryas, the respondent, brought this suit originally in January, 1932, to recover total and permanent disability benefits in monthly installments under a contract of war risk term insurance in the sum of $10,000 issued to him while in the military service of the United States

between October 5, 1917, and July 29, 1919. (R. 2–5.) In April, 1936, he filed an amended complaint containing two counts. The first was similar in substance to the original complaint (R. 11–13) and was later abandoned by stipulation (R. 20). By the second count, on which the case was tried, respondent sought to recover total and permanent disability benefits, together with unearned premiums, under a five-year convertible term policy of United States Government life insurance, to which his insurance was alleged to have been converted in July, 1927. (R. 13–15.) It was alleged in this count, and denied by the Government's answer, that he had become totally and permanently disabled on or prior to January 26, 1931, while the subsequent policy was in force. (R. 9, 14.)

It was established by admission in the Government's answer, stipulation of the parties, or by undisputed evidence, that the original war risk term insurance contract was issued to the respondent on January 31, 1918, and lapsed for nonpayment of premiums August 31, 1919; that on June 28, 1927, it was reinstated and converted into the five-year convertible term policy (effective July 1, 1927) which in turn lapsed for nonpayment of the premium due July 1, 1932; and that the respondent filed a claim for permanent and total disability benefits under the latter policy on January 6 (R. 20), or May 2, 1931 (R. 21).

At the close of the evidence, the Government moved the court to direct a verdict in its favor upon the grounds: (1) that respondent failed to adduce substantial evidence that he "became" totally and permanently disabled while his contract of insurance was in force, and (2) that if there were proof of total and permanent disability, such disability had existed since 1924, and that the policy in suit did not "come into being" until 1927. The court thereupon reserved its ruling upon the point relating to the existence of total and permanent disability prior to the inception of the policy (R. 44), and acceded to the request of counsel for the Government that the record should show an exception in the event the motion was overruled. The bill of exceptions recites that the motion was overruled, and that the Government excepted to this ruling. (R. 45.) It also recites that there was a similar ruling and exception after the verdict. (R. 48.)[1]

The court instructed the jury that if respondent became totally and permanently disabled after

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[1] The Circuit Court of Appeals, presumably because of its decision upon other questions of law, did not decide the question as to whether the evidence supported the Government's motion for a directed verdict. For that reason, and because the question as to which review is here sought was otherwise preserved, the evidence is not reviewed herein. If this Court should determine that the Circuit Court of Appeals was in error and a decision upon the evidence in connection with the Government's motion for a directed verdict should be deemed necessary, it is assumed that the case will be remanded to the Circuit Court of Appeals for that purpose. Cf. *Earwood* v. *United States*, 294 U. S. 695.

June 1, 1932, he could not recover because the policy lapsed at that time[2] (R. 47), but refused the request of counsel for the Government for a further instruction to the effect that respondent would also be unable to recover if he became totally and permanently disabled before "July 27th, 1927."[3] The trial judge stated, in substance, that he had not had an opportunity to study the policy on this point; that he would therefore ask the jury simply to fix the date of permanent and total disability and would himself later determine any question of law which might be presented by their finding. Counsel for the Government thereupon asked: "May I make my record on that?", and the court replied in the affirmative. (R. 48.) The jury rendered a general verdict in favor of respondent, but fixed "the date" of total and permanent disability "at the latter part of 1924." (R. 48.)

Thereafter, the Government made a motion for judgment on the verdict, and a separate motion for a new trial and in arrest of judgment. These motions were overruled, and exceptions were duly noted. (R. 17–18.) A motion for a new trial and in arrest of judgment was again made, overruled, and excepted to, subsequent to the entry of judgment for the respondent. (R. 19.) The judgment

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[2] The court evidently overlooked the fact that the parties had stipulated July 1, 1932, as the date of lapse. (R. 20.)

[3] Counsel for the Government evidently meant to say June 28, 1927, which was the date of the reinstatement and conversion of the insurance. (R. 20.)

awarded respondent the sum of $3,737.50, representing accrued monthly installments of insurance benefits from January 25, 1931, to May 25, 1936, less the sum of $1,198.49, representing a lien with interest which the Government, in its answer (R. 9), claimed against the policy in the event of a recovery (R. 18–19). An appeal was duly prayed (R. 49), allowed (R. 53), and perfected (R. 49–52, 54–55), and the bill of exceptions settled and signed within time (R. 18, 48, 53). Error was assigned to the trial court's rulings, among others, (a) in refusing to instruct the jury to return a verdict for the Government for lack of substantial evidence that respondent became totally and permanently disabled during the life of the insurance policy sued upon; (b) in refusing the request of counsel for the Government to instruct the jury that if they found from the evidence that the respondent became so disabled prior to June 27[28], 1927, when the policy was issued, they should return a verdict for the Government (Assignment of Errors Nos. 1 and 2, R. 50); and (c) in not holding, as a matter of law, that the respondent was not able to recover because all of his evidence, if taken to be true and if amounting to total and permanent disability, indicated that he was so disabled before the existence of the policy (Assignment of Error No. 5, R. 52).

The Circuit Court of Appeals affirmed the judgment of the trial court. (R. 60.) It was conceded, in the opinion, that the risk assumed by the

policy in suit "did not cover disabilities existing prior to the date of the policy", and that it "covered future total and permanent disability benefits—monthly disability payments accruing after, not before, the issuance of the policy." (R. 60.) The court held, however (concededly contrary to the weight of authority), that the incontestable clause contained in the policy, pursuant to the statute,[4] prevented the Government from denying liability to pay such benefits on the ground that the policy did not cover a disability which occurred prior to its inception. (R. 58.)

It also held that, aside from the incontestable clause, the Government was estopped to set up the defense in question by the acts of its officials. In this connection, it was stated that respondent "who occupied somewhat the status of a ward", reinstated and converted his insurance upon the advice of Government officials who, though not conceding that his disability was then permanent and total, were better informed of his physical and mental condition than the respondent was himself; that he thereby waived the right to claim total and permanent disability benefits under his original contract of war risk term insurance (which expired in 1919), and waived exemption from the payment of premiums subsequent to the date of maturity of that policy, and consented to

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[4] Section 307, World War Veterans' Act, 1924, as amended July 3, 1930, *infra*, pp. 25–26.

the creation of a lien against the new policy to cover such premiums; that the Government was the gainer by reason of such waivers; and that it would be unjust to allow it to take advantage of them and then to repudiate its liability under the contract. (R. 59.) It was also asserted (erroneously—see *supra*, pp. 4, 5) in the opinion, presumably with estoppel in mind, that the Government did not take the position that it was not liable under the policy for a pre-existing disability, until after the jury had found such disability to exist. (R. 58.)

A third ground for affirming the judgment was suggested in the opinion to be the failure of the Government "to include all the evidence in its bill of exceptions." In this connection, it was stated that the policy had been omitted, and particular reference was made to the omission of the incontestable clause. The court stated, however, that it assumed "that the statute defines and fixes the incontestable provisions of the policy in question", and that this omission was therefore not "the sole basis" of its decision. (R. 60.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding the Government liable to pay total and permanent disability benefits under a United States Government life insurance policy, converted from a reinstated contract of war risk term insurance, on account of a total and permanent disability

which had its inception prior to the reinstatement and conversion of the insurance.

2. In holding that the Government was prevented from asserting that the subsequent policy did not cover such a disability by the provisions in Section 307 of the World War Veterans' Act, 1924, as amended July 3, 1930, to the effect that all policies of insurance issued by the Government shall be incontestable from the date of issuance, reinstatement, or conversion.

3. In holding that, aside from the statute, the Government was estopped from asserting such a defense in the instant case by the acts of its officials.

4. In holding (if it did so hold) that the omission of portions of the policy from the bill of exceptions precluded consideration of the Government's motion for a directed verdict.

5. In declining to reverse the judgment of the District Court upon the record proper, apart from the bill of exceptions.

6. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

It is conceded in the opinion of the Circuit Court of Appeals that its decision conflicts with a number of decisions of other Circuit Courts of Appeals and District Courts, in holding that the Government was liable for disability benefits under a policy of insurance, converted from a reinstated contract of war risk term insurance, even though total and per-

manent disability occurred prior to the reinstatement and conversion. It is submitted that the decision of the court below is also in conflict with decisions of this Court, and with certain decisions of Circuit Courts of Appeals in addition to those mentioned in the opinion below.

(1) The court below, while conceding that a disability existing prior to the inception of the policy was not covered by it (R. 60), held, in effect, that the Government is precluded from denying liability to pay benefits under the policy on account of such a disability by the clause in Section 307 of the World War Veterans' Act, 1924, as amended July 3, 1930, *infra*, pp. 25–26, which provides that—

> policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, * * *.

It is submitted, however, that this clause is wholly inapplicable to the case at bar. Its purpose is plainly limited by its terms to preventing the Government from contesting the policy itself by cancellation or otherwise, except upon the grounds specified, and not of preventing it, as insurer, from denying liability under the policy for a loss which, as here, was not covered by the terms of the policy. In other words, it is the "policies" which "shall be

incontestable," not claims made under them. The Government is not here contesting the policy, the issuance and validity of which is undisputed, but rather invoking and relying upon it in defense against a claim not covered by the insurance. To hold that this defense is a contest within the meaning of the statute would necessitate a distortion of the plain and ordinary meaning of the words of the statute. Moreover, this view has been expressly adopted in all of the decisions of Circuit Courts of Appeals involving the clause in question. *United States* v. *Kaminsky*, 64 F. (2d) 735 (C. C. A. 5th); *Hicks* v. *United States*, 65 F. (2d) 517, 520 (C. C. A. 4th); *United States* v. *Stevens*, 64 F. (2d) 853 (C. C. A. 8th). See also *United States* v. *McIver*, 77 F. (2d) 208 (C. C. A. 4th); *United States* v. *Mathis*, 84 F. (2d) 451 (C. C. A. 10th); *United States* v. *Meyer*, 76 F. (2d) 354 (C. C. A. 3rd).

And a similar meaning has been given by the Federal courts to incontestable clauses in commercial policies. *Mack* v. *Connecticut General Life Ins. Co. of Hartford*, 12 F. (2d) 416, 418 (C. C. A. 8th), certiorari denied, 271 U. S. 687; *Sanders* v. *Jefferson Standard Life Ins. Co.*, 10 F. (2d) 143 (C. C. A. 5th); *Flannagan* v. *Provident Life & Accident Ins. Co.*, 22 F. (2d) 136 (C. C. A. 4th); *Hearin* v. *Standard Life Ins. Co.*, 8 F. (2d) 202, 206 (E. D. Ark.); *Wright* v. *Philadelphia Life Ins. Co.*, 25 F. (2d) 514, 515 (E. D. S. C.).

The decision in *United States* v. *Chandler,* 77 F. (2d) 452 (C. C. A. 5th), cited in the opinion of the court below, rested on the court's finding that there was no substantial evidence that the insured was totally and permanently disabled at any time. Upon such evidence, there was, of course, no basis for the application of the court's earlier ruling in the *Kaminsky* case, *supra,* which, with other like cases, was cited in the *Chandler* opinion. We submit that there is no basis for any contention that the *Chandler* decision overruled the court's earlier holding in the *Kaminsky* case.

Neither of its own decisions, cited by the court below in its opinion, affords any support to its position here. *Service Life Ins. Co.* v. *Weinberg,* 81 F. (2d) 359, was a suit by an insurance company to cancel a policy for fraud. It was not disputed that the insurer was contesting the policy within the meaning of the incontestable provision in a local statute. The decision, therefore, has no bearing on the question here presented. *State Mutual Life Ins. Co.* v. *Stapp,* 72 F. (2d) 142, tends more to support the Government's position than that of the court below. There the insurer denied liability under a suicide clause in the policy, and alleged, as a separate defense, that the policy was void for fraud. The court below rejected the former defense on the ground that the suicide did not occur within the time limited by the suicide clause (pp. 144, 145), and held the latter defense barred by the

incontestable clause (p. 146). If the court's view there as to what constitutes a contest of a policy were consistent with the one expressed in its opinion here, there would seem no reason why it should not have held both defenses barred by the incontestable clause.

(2) Furthermore, it is submitted that the Circuit Court of Appeals erred in holding that, aside from the incontestable clause, the Government was estopped from asserting the existence of respondent's total and permanent disability prior to the reinstatement and conversion of his insurance, by the acts of its officials in permitting the insurance to be reinstated and converted. (R. 59.)

It is submitted that respondent suffered no injury or change of position which would justify raising an estoppel.

It is said that in reinstating and converting his insurance, respondent waived his right to claim permanent and total disability benefits under his original war risk term insurance contract. In this respect, the court is plainly in error. Section 307 of the World War Veterans' Act, 1924, as amended July 3, 1930, *infra*, p. 26, contains provisions under which respondent might have claimed total and permanent disability benefits under his original contract, notwithstanding reinstatement or conversion, provided, of course, that he could show that total and permanent disability existed while the former contract was in force. See *United States* v.

Arzner, 57 F. (2d) 488 (C. C. A. 9th), 287 U. S. 470; *United States* v. *Madigan,* 300 U. S. 500.

The court states in its opinion (R. 59):

> The ward consented to the payment of all premiums he had failed to pay since his discharge from service, through the imposition of a substantial lien against the reinstated policy.

The imposition of the lien involved no change in the position of the insured induced by the Government, but was merely a condition of the statute to the reinstatement of insurance. Moreover, the lien would be extinguished if the insured could show a maturity of an earlier contract of insurance. Section 307, World War Veterans' Act, 1924, as amended July 3, 1930, *infra,* p. 26; *United States* v. *Arzner, supra.*

It is true that when the reinstatement of insurance was effected, both the Government and the insured considered his disability at that time to be less than totally and permanently disabling. The Government has at no time changed its view as to the condition of the insured. His claim for benefits was defended upon the ground that he was not totally and permanently disabled at any time. The insured, however, has claimed that he is totally and permanently disabled as the result of a condition found by the jury to have been totally and permanently disabling from a date long prior to reinstatement. The policy clearly does not pro-

vide that the Government shall be liable for such total permanent disability antedating the inception of insurance protection. We submit that the mutual mistake as to the condition of the insured at the time of reinstatement, now established by the jury's verdict, does not provide a basis for estoppel against the Government, whether or not it provides a basis for a claim by the insured for rescission of the contract and a refund of the premiums.[5]

It is further submitted that the opinion of the court below in holding that the Government is estopped to deny liability in this case conflicts with numerous decisions of this Court to the effect that the Government is neither bound nor estopped by the acts or omissions of its officers or agents in entering into an arrangement or agreement contrary to law. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Sutton* v. *United States,* 256 U. S. 575, 579; *Lee* v. *Munroe,* 7 Cranch. 366, 369; *Filor* v. *United States,* 9 Wall. 45, 49; *Pine River Logging Co.* v. *United States,* 186 U. S. 279,

[5] The incontestable clause of the statute presumably does not apply to the insured himself. However, it may be noted that the insured would be entitled to life insurance protection under the converted policy, since the fact of preexisting total permanent disability at the time of reinstatement would not have avoided maturity by death. Moreover, the premium rate on Government life insurance is based entirely on the American Experience Table of Mortality (see Sec. 300, World War Veterans' Act, *infra*, p. 23) and the disability provisions of the contract provide gratuitous protection.

291. See also *Birmingham* v. *United States,* 4 F. (2d) 508 (C. C. A. 8th); *United States* v. *Loveland,* 25 F. (2d) 447 (C. C. A. 3d) (error confessed for failure to file a written waiver of jury trial, 278 U. S. 665).

As previously indicated, there existed no statutory authority on the part of Government officials to authorize the reinstatement or conversion of respondent's insurance to cover a disability already in existence. In *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, involving a policy similar to the one here, this Court granted a writ of certiorari upon the petition filed by the personal representative of the estate of the insured, which raised the question of whether or not the general rule announced by the cases above cited was subject to modification with reference to such policies, on the ground that they were in the nature of commercial transactions, and hence not entered into by the United States in its sovereign capacity. Upon argument of that case, however, this Court held it unnecessary to decide that question since the claim of estoppel or waiver was not supported by the evidence in any event.

It is again submitted that, as the Government does not issue and administer this insurance for profit and obtains none, it cannot be said in that connection to have stepped down from its position as sovereign and entered the field of commerce. There would therefore seem no justification for

applying a different rule to policies like the one here in suit from that which is applicable to ordinary Government contracts.

(3) It is submitted that the omission of the provisions of the policy referred to in the last paragraph of the opinion of the court below did not, as suggested by it, prevent review of the motion for a directed verdict. All of the provisions having any bearing upon the questions raised on the appeal were included in the bill of exceptions. (R. 20.) The incontestable clause specifically referred to by the court was conceded by it to be contained in Section 307 of the World War Veterans' Act, as amended July 3, 1930, *infra,* pp. 25–26. It is manifest that this provision, as contained in the policy, was properly omitted, since it was inserted under a prior Act (Section 307, World War Veterans' Act, 1924, *infra,* p. 25), differing in terms from the incontestable provisions contained in the amendatory Act of July 3, 1930, which is specifically made retroactive to April 6, 1917, and, therefore, governs here.

(4) But, in any event, the questions here sought to be reviewed were properly presented by the record proper, apart from the bill of exceptions. The terms of the contract, in so far as they are relevant to the questions here presented, may be ascertained from statutory provisions and, when considered in connection with the special finding in the verdict as to the existence of total and permanent disability

at a date prior to the reinstatement and conversion of the insurance, and with the judgment, present the question whether the Government is liable under the insurance contract to pay benefits for such a disability. *United States* v. *McPhee*, 31 F. (2d) 243, 244–245 (C. C. A. 9th). See also *East St. Louis Cotton Oil Co.* v. *Skinner Bros. Mfg. Co.*, 249 Fed. 439, 441–442 (C. C. A. 8th); *Denver* v. *Home Savings Bank*, 236 U. S. 101.

Although error was not specifically assigned to the entry of judgment on the verdict, it is suggested that the point was adequately covered by the assignments of error relating to other rulings involving the same question as that presented by the entry of the judgment. Cf. *United States* v. *Bernays*, 158 Fed. 792, 794 (C. C. A. 8th).

For the reasons stated, it is respectfully submitted that this application for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1937.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The first authority to grant war risk insurance was contained in the Act of October 6, 1917, sec. 2 (c. 105, 40 Stat. 398, 409–410), amending the War Risk Insurance Act by adding five new sections, providing in part:

> SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.
>
> SEC. 401. That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred

and twenty days thereafter and while in such service. Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance * * * shall be payable * * * during total and permanent disability to the injured person, * * *. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for

cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * *.

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, * * *.

Bulletin No. 1 of the Treasury Department, promulgated October 15, 1917, contained the form of the policy to be issued pursuant to the Act of October 6, 1917, providing in part:

(Form of policy for $5,000)

MILITARY AND NAVAL INSURANCE POLICY

* * * * *

THE UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE

Under the authority granted by Congress in an act * * *:

Hereby insures from and after the ------ day of ----------, 19--, John Doe, * * *, conditioned upon the payment of premiums

as herein provided, for the principal amount of $5,000, converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ per cent per annum) payable

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability; and

To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force, * * *:

* * * * *

If the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against such disability.

* * * * *

Not later than five years after the war this policy, if written request be made to the bureau therefor, accompanied by this policy, will be converted without medical examination into any form of insurance selected from among those that may be prescribed by regulations of the bureau. Such converted insurance will be at net premiums, computed in accordance with the American Experience Table of Mortality and 3½ per cent interest per annum and will provide for cash, loan, paid-up, and extended insurance values.

* * * * *

9. These terms and conditions are subject in all respects to the provisions of such act and of any amendments thereto and of all

regulations thereunder now in force or hereafter adopted.

The World War Veterans' Act, 1924, as amended and in effect when respondent's insurance was reinstated and converted, provides in part as follows:

> SEC. 300. In order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employel in active service under the War Department or Navy Department protection for themselves and their dependents, the United States, upon application to the bureau and without medical examination, shall grant United States Government life insurance (converted insurance) against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided. * * *.
>
> * * * * * *
>
> The United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at 3½ per centum per annum. * * *. (July 2, 1926, c. 723, sec. 14, 44 Stat. 798–799.)
>
> SEC. 301. Except as provided in the second paragraph of this section, not later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for

the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, * * *. (June 2, 1926, c. 449, 44 Stat. 686.)

SEC. 304. In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by

the terms of the policy: *Provided further,* That where within one year of this amendatory Act all of the requirements for reinstatement of yearly renewable term insurance under this section are complied with, except the payment of unpaid premiums with interest, and proof satisfactory to the director is furnished showing the applicant is unable to pay such premiums with interest or some part thereof, the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest-bearing indebtedness against the insurance, such indebtedness to bear interest at the rate of 5 per centum per annum, compounded annually, to be deducted in any settlement thereunder: *And provided further,* That no yearly renewable term insurance shall be reinstated after July 2, 1927. (July 2, 1926, c. 723, sec. 15, 44 Stat. 799.)

SEC. 307. All such policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums and subject to the provisions of section 23: *Provided,* That a letter mailed by the bureau to the insured at his last known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section: *Provided further,* That this section shall be deemed to be in effect as of April 6, 1917. (June 7, 1924, c. 320, 43 Stat. 627.)

This section was amended by the Act of July 3, 1930, c. 849, sec. 24, 46 Stat. 1001–1002, to provide:

All contracts or policies of insurance heretofore or hereafter issued, reinstated,

or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: *Provided,* That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy: *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance.

U. S. GOVERNMENT PRINTING OFFICE: 1919

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	8
Summary of argument	9
Argument:	
I. The statute under which this contract was issued authorized insurance protection only, and did not contemplate liability for other than prospective losses	13
II. Denial of liability on the ground that the loss insured against has not occurred is not a contest within the meaning of the incontestable clause in Section 307, World War Veterans' Act	22
III. There is no estoppel against the denial of the respondent's claim	27
IV. The question presented was properly reserved for appellate review	34
Conclusion	36
Appendix A (Statutes)	37
Appendix B (Regulations and administrative practice)	48
Appendix C (Congressional committee reports)	68
Appendix D (Court rules)	70

CITATIONS

Cases:

Anderson v. *United States*, 36 F. (2d) 45	19, 21, 24
Barnes v. *Aetna Life Ins. Co.*, 7 S. W. (2d) 946	15
Caminetti v. *United States*, 242 U. S. 470	25
Clardy v. *Grand Lodge of Oklahoma*, 132 Okla. 165	15
Davis v. *United States*, 57 F. (2d) 871	22, 25
Dees v. *National Cas. Co.*, 17 Tenn. App. 183	15
De Ganay v. *Lederer*, 250 U. S. 376	15
Duggan v. *United States*, 36 F. (2d) 804	19
Earwood v. *United States*, 294 U. S. 695	4
Flannagan v. *Provident Life & Accident Ins. Co.*, 22 F. (2d) 136	23
Gunnison County Commissioners v. *Rollins*, 173 U. S. 255	35
Hearin v. *Standard Life Ins. Co.*, 8 F. (2d) 202	24
Hicks v. *United States*, 65 F. (2d) 517	21, 24
John Hancock Mutl. L. Ins. Co. v. *Hicks*, 43 Ohio App. 242	15
Johnson v. *Manhattan Ry. Co.*, 289 U. S. 479	25
Jordan v. *United States*, 36 F. (2d) 43	19, 21, 24

40661—38——1

Cases—Continued. Page

Lincoln v. *Ricketts*, 297 U. S. 373 15
Litchfield v. *Goodman*, 123 U. S. 549 32
Mack v. *Connecticut General Life Ins. Co. of Hartford*, 12 F. (2d) 416, certiorari denied, 271 U. S. 687 23
Matter of Met. Life Ins. Co. v. *Conway*, 252 N. Y. 449 23
Mayer v. *Insurance Co.*, 121 Pa. Super. 475 ..... 15, 23
Miller v. *United States*, 294 U. S. 435, rehearing denied, 294 U. S. 734 21
Nall v. *United States*, 8 F. Supp. 69 ..... 22, 25
Nold v. *United States* (W. D. Mo.) July 1928, unreported 19
Oliver v. *United States* (Ariz.) August 1928, unreported 19
Peoria Life Ins. Co. v. *Smith*, 47 F. (2d) 279 15
Sanders v. *Jefferson Standard Life Ins. Co.*, 10 F. (2d) 143 23
Schmidt v. *United States*, 63 F. (2d) 390 ..... 22, 25
Stavros v. *United States*, 3 F. Supp. 213 ..... 22, 25
Stevens v. *United States*, 29 F. (2d) 904 ..... 19, 31
United States v. *Acker*, 35 F. (2d) 646 19
United States v. *Allen*, 33 F. (2d) 888 32
United States v. *Andrews*, 43 F. (2d) 80 32
United States v. *Arzner*, 287 U. S. 470 ..... 20, 29, 32
United States v. *Bernays*, 158 Fed. 792 35
United States v. *Buzard*, 33 F. (2d) 883 ..... 19, 30, 34
United States v. *Chandler*, 77 F. (2d) 452 ..... 21, 22
United States v. *Cross*, 33 F. (2d) 887 31
United States v. *Densmore*, 58 F. (2d) 748, certiorari denied, 287 U. S. 590 35
United States v. *Falk*, 204 U. S. 143 25
United States Fidelity & Guaranty Co. v. *Ettenheimer*, 70 Neb. 144 32
United States v. *Jackson*, No. 199, October Term, 1937, decided January 17, 1938 16
United States v. *Kaminsky*, 64 F. (2d) 735 ..... 21, 22, 24
United States v. *Kusnierz*, 33 F. (2d) 887 31
United States v. *McIver*, 77 F. (2d) 208 ..... 22, 25
United States v. *Madigan*, 300 U. S. 500 17
United States v. *Schweppe*, 38 F. (2d) 595 ..... 19, 32
United States v. *Stevens*, 64 F. (2d) 853 ..... 21, 24, 32
Wilson v. *United States* (W. D. Mo.), June 1929, unreported 19
Wright v. *Philadelphia Life Ins. Co.*, 25 F. (2d) 514 24

Statutes:

War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 409:

Sec. 13 48
Sec. 400 ..... 14, 37
Sec. 401 ..... 16, 37–38
Sec. 402 48
Sec. 404 38–39

Statutes—Continued. Page

Sec. 408, War Risk Insurance Act, as amended August 9, 1921, c. 57, Sec. 27, 42 Stat. 156–157 ..... 16, 18, 30, 39–40
Sec. 300, World War Veterans' Act, as amended May 29, 1928, c. 875, Sec. 13, 45 Stat. 967 ..... 14, 40–42
Sec. 301, World War Veterans' Act, as amended June 2, 1926, c. 449, 44 Stat. 686 ..... 28, 42–43
Sec. 304, World War Veterans' Act, as amended July 2, 1926, c. 723, Sec. 15, 44 Stat. 799 ..... 18, 28, 29, 30, 44–45
Sec. 305, World War Veterans' Act, as amended May 29, 1928, c. 875, Sec. 17, 45 Stat. 971 17
Sec. 307, World War Veterans' Act, June 7, 1924, c. 320, 43 Stat. 627 ..... 24, 46
Sec. 307, World War Veterans' Act, as amended July 3, 1930, c. 849, Sec. 24, 46 Stat. 1001 ..... 7, 10, 11, 18, 22–23, 26, 28, 30, 32, 35, 46–47
Sec. 5, World War Veterans' Act, as amended July 3, 1930, c. 849, Sec. 1, 46 Stat. 991 48

Miscellaneous:

Bulletin No. 1, Treasury Department, October 15, 1917 ..... 21, 48–58
Veterans' Administration Form No. 745 ..... 21, 52–57
Letter from Administrator of Veterans' Affairs, dated October 6, 1937 ..... 21, 58–67
H. Rep. 104, 67th Cong., 1st Sess 25, 68
S. Rep. 1128, 71st Cong., 2d Sess 25, 68–69
Artley, Marion, 8 Comp. Gen. 387 26
Boehler, Frank, 7 Comp. Gen. 248 26
Giblin, Joseph M., 8 Comp. Gen. 174 26
Hill, Forrest Reed, 7 Comp. Gen. 431 26
McNish, Philips, 7 Comp. Gen. 551 26
Stevens, Andy, 7 Comp. Gen. 642 26
Woodall, Mabray W., 9 Comp. Gen. 291 26
31 Op. A. G. 534 ..... 18–19, 24
Couch on Insurance, Vol. 6, Sec. 1330 15
Rule 9, paragraph 2, Circuit Court of Appeals for the Seventh Circuit 35, 70

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 445

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY J. PATRYAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 57–60) is reported in 90 F. (2d) 715.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 21, 1937. (R. 60.) The petition for a writ of certiorari was filed on September 21, 1937, and granted on November 8, 1937 (R. 62). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a suit for disability benefits under a contract of United States Government life insurance, the Government is liable where it is shown that total permanent disability occurred prior to the reinstatement and conversion of the insurance.

2. Whether the Circuit Court of Appeals erred in holding (if it did so hold) that the omission of portions of the policy from the bill of exceptions precluded consideration of the Government's motion for a directed verdict.

3. Whether, in any event, the judgment of the District Court should not have been reversed by the court below upon the record proper, apart from the bill of exceptions.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in Appendices A and B, *infra*, pp. 37–67.

STATEMENT

Stanley J. Patryas, the respondent, brought this suit originally in January, 1932, to recover total and permanent disability benefits under a contract of war risk term insurance in the sum of $10,000, issued to him while in the military service of the United States between October 5, 1917, and July 29, 1919. (R. 2–5.) In April 1936, he filed an amended complaint containing two counts. The first was similar in substance to the original complaint (R. 11–13) and was later expressly aban-

doned (R. 20). By the second count, on which the case was tried, respondent sought to recover total and permanent disability benefits, together with unearned premiums, under a five-year convertible term policy of United States Government life insurance. (R. 13–15.) It was alleged in this count, and denied by the Government's answer, that he had become totally and permanently disabled on or prior to January 26, 1931, while the latter policy was in force. (R. 9, 14.)

It was established by admission in the Government's answer and stipulation of the parties that the original war risk term insurance contract was issued to the respondent on January 31, 1918, and lapsed for nonpayment of premiums on August 31, 1919; that on June 28, 1927, it was reinstated and converted into the five-year convertible term policy (effective July 1, 1927, R. 9) which, in turn, lapsed for nonpayment of the premium due July 1, 1932; and that the respondent filed a claim for permanent and total disability benefits under the latter policy on January 6, 1931 (R. 20).[1]

At the close of the evidence, the Government moved the court to direct a verdict in its favor upon the grounds: (1) that respondent failed to adduce substantial evidence that he "became" totally and permanently disabled while his contract of insur-

[1] Presumably this was an informal claim. Formal claim (Veterans' Administration Form No. 579) was filed in the Veterans' Administration on May 2, 1931. (R. 21.)

ance was in force, and (2) that if there were proof of total and permanent disability, such disability had existed since 1924, and that the policy in suit did not "come into being" until 1927. The court thereupon reserved its ruling upon the motion (R. 44), and acceded to the request of counsel for the Government that the record should show an exception in the event the motion were overruled. The bill of exceptions then recites that the motion was overruled, and that the Government expressly excepted to this ruling. (R. 45.) It also recites that there was a similar ruling and exception after the verdict. (R. 48.)[2]

The court instructed the jury that if respondent became totally and permanently disabled after June

[2] It was urged in the Circuit Court of Appeals that there was no substantial evidence that the insured "became" totally and permanently disabled during the period of insurance protection, but it was not disputed that the evidence justified the finding which the jury made that the insured was totally and permanently disabled prior to the issuance of the contract sued upon. The Circuit Court of Appeals, presumably because of its holding that disability benefits were payable if total permanent disability existed during the life of the contract, did not review the evidence for the purpose of determining whether the Government's motion for a directed verdict should have been granted. The question as to which review is here sought was presented by exceptions taken to other rulings in the trial court. If this Court should determine that a decision upon the evidence in connection with the Government's motion for a directed verdict is necessary, it is assumed that the case will be remanded to the Circuit Court of Appeals for that purpose. Cf. *Earwood* v. *United States*, 294 U. S. 695.

1, 1932, he could not recover because the policy lapsed at that time [3] (R. 47), but refused the request of counsel for the Government for a further instruction to the effect that respondent also could not recover if he became totally and permanently disabled before "July 27th, 1927".[4] The trial judge stated, in substance, that he had not had an opportunity to study the policy on this point; that he would, therefore, ask the jury simply to fix the date of permanent and total disability, and would himself later determine any question of law which might be presented by their finding. (R. 47.) Counsel for the Government asked: "May I make my record on that?", and the court replied in the affirmative. (R. 48.) The jury rendered a verdict in favor of respondent, but fixed "the date" of commencement of total and permanent disability "at the latter part of 1924." (R. 48.)

Thereafter, the Government made a motion for judgment on the verdict, and a separate motion for a new trial and in arrest of judgment. These motions were overruled, and exceptions were duly noted. (R. 17–18.) Motions for a new trial and in arrest of judgment were again made, overruled, and excepted to, subsequent to the entry of judgment for the respondent. (R. 19.) The judgment

[3] The court evidently overlooked the fact that the parties had stipulated July 1, 1932, as the date of lapse. (R. 20.)

[4] Counsel for the Government evidently meant to say June 28, 1927, which was the date of the reinstatement and conversion of the insurance. (R. 20.)

awarded respondent the sum of $3,737.50, representing accrued monthly installments of insurance benefits from January 25, 1931,[5] to May 25, 1936, less the sum of $1,198.49, representing a lien with interest which the Government, in its answer (R. 9), claimed against the policy in the event of a recovery (R. 18–19).

An appeal was duly prayed (R. 49), allowed (R. 53), and perfected (R. 49–52, 54–55), and the bill of exceptions settled and signed within time (R. 18, 48, 53). Error was assigned to the trial court's rulings, among others, (a) in refusing to instruct the jury to return a verdict for the Government for lack of substantial evidence that respondent became totally and permanently disabled during the life of the insurance policy sued upon; (b) in refusing the request of counsel for the Gov-

[5] The record does not disclose the reason for the selection of this date. The jury fixed the date of the total permanent disability of the insured "at the latter part of 1924" (R. 48); the policy was issued effective July 1, 1927 (R. 9), on application of June 28, 1927 (R. 20). The petition, as amended (R. 14), alleged that "afterwards and prior to, to-wit, January 26, 1931, he became totally and permanently disabled," and that "thereafter on, to-wit, the 25th day of May, 1931, made due proof of his total permanent disability." None of these dates has any apparent relation to the beginning date of the award in the judgment. The policy provisions Paragraph 11 (Appendix, *infra*, pp. 55–56), as to due proof of total permanent disability, restrict recovery after total permanent disability to a date "not exceeding six months prior to receipt of due proof of such total permanent disability."

ernment to instruct the jury that if they found from the evidence that the respondent became so disabled prior to July 27 (June 28), 1927, when the policy was issued, they should return a verdict for the Government (Assignment of Errors Nos. 1 and 2, R. 50); and (c) in not holding, as a matter of law, that the respondent could not recover because all of his evidence, if taken to be true and if amounting to proof of total and permanent disability, indicated that he was so disabled before the existence of the policy (Assignment of Error No. 5, R. 52).

The Circuit Court of Appeals affirmed the judgment of the trial court. (R. 60.) The court conceded in the opinion that the risk assumed by the policy in suit "did not cover disabilities existing prior to the date of the policy," but stated that it "covered future total and permanent disability benefits—monthly disability payments accruing after, not before, the issuance of the policy." (R. 60.) It held (concededly contrary to the weight of authority), that the incontestable clause contained in the policy, pursuant to the statute,[6] prevented the Government from denying liability on the ground that the policy did not cover a disability which occurred prior to its inception. (R. 68.)

It also held that, apart from the incontestable clause, the Government was estopped by the facts

[6] Section 307, World War Veterans' Act, 1924, as amended July 3, 1930 (Appendix, *infra*, pp. 46–47).

relating to the reinstatement and conversion of the insurance to set up the defense in question. A third ground for affirming the judgment was suggested in the opinion to be the failure of the Government "to include all the evidence in its bill of exceptions". In this connection, it was stated that the policy had been omitted, and particular reference was made to the omission of the incontestable clause. The court stated, however, that it assumed "that the statute defines and fixes the incontestable provisions of the policy in question", and that this omission was, therefore, not "the sole basis" of its decision. (R. 60.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding the Government liable to pay total and permanent disability benefits under a United States Government life insurance policy, converted from a reinstated contract of war risk term insurance, on account of a total and permanent disability which had its inception prior to the reinstatement and conversion of the insurance.

2. In holding that the Government was prevented from asserting that the subsequent policy did not cover such a disability by the provisions in Section 307 of the World War Veterans' Act, 1924, as amended July 3, 1930, to the effect that all policies of insurance issued by the Government shall be incontestable from the date of issuance, reinstatement, or conversion.

3. In holding that, aside from the statute, the Government was estopped from asserting such a defense in the instant case by the acts of its officials.

4. In holding (if it did so hold) that the omission of portions of the policy from the bill of exceptions precluded consideration of the Government's motion for a directed verdict.

5. In declining to reverse the judgment of the District Court upon the record proper, apart from the bill of exceptions.

6. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

I

Congress is presumed to have used the word "insurance" in the statutes authorizing the insurance here involved in its usual and ordinary meaning as protection against a contingent future loss, for there is no evidence of any other intention, and therefore total permanent disability occurring prior to such insurance cannot serve to mature the policy.

It is to be inferred from the fact that Congress has expressly authorized the payment of benefits for death or total permanent disability occurring at a time when insurance was not in force in two classes of cases, that no other exceptions were intended.

Moreover, the statutory requirement that an applicant for reinstatement furnish proof that he is

not totally and permanently disabled is inconsistent with an intention to provide for disability payments under a reinstated contract for a pre-existing total permanent disability.

Furthermore, the fact that Congress specifically provided in Section 307, World War Veterans' Act, as amended July 3, 1930, that an insured might recover payments for total permanent disability occurring while insurance was in force, despite a subsequent lapse and reinstatement, and failed to provide for payments under the reinstated insurance for total permanent disability occurring prior to such reinstatement, is evidence, we think, that such payments were not intended. Especially is this true since the legislation authorizing the payment of disability benefits under an earlier policy despite subsequent reinstatement was enacted for the express purpose of overcoming judicial rulings denying such recovery, while other decisions, presumably equally well known to Congress, holding that there could be no recovery for total permanent disability existing prior to the insurance on which claim was made, were not the subject of legislation.

The view that the insurance here involved provided protection only against subsequent death or total permanent disability is consistent with the final holding in all decided cases presenting the point, except the instant case, and even in this case the court below states in its opinion that "the risk

did not cover disabilities existing prior to the date of the policy."

II

The incontestable clause provided in Section 307, World War Veterans' Act, as amended July 3, 1930, does not preclude the Government from denying liability upon the insurance in this case, as was held by the court below.

The incontestable clause merely protects the insurance against any attack upon its validity and has no application where, as here, the validity of the insurance is undisputed, and the claim under it is denied solely on the ground that the contingency upon which the claim was based did not occur while the policy was in force and therefore was not insured against. Comparable clauses in commercial policies have been so construed in numerous decisions of state and federal courts.

A like judicial construction had been given to the language of Section 307 as worded prior to the amendment of July 3, 1930. The amendment made no change designed to alter this construction and, except in the instant case, such a construction has been given to the Section, as amended, in all decided cases. These later decisions are consistent with the established rule that a reenactment of legislation having a known judicial construction is presumed to adopt such construction.

While we think that the incontestable provision of the statute, as amended July 3, 1930, is clear on its face and provides no support for the conclusion of the court below, the Committee Reports, if resort to them is permissible, will show that the amendment was for the sole purpose of overcoming certain decisions of the Comptroller General which had declared reinstated insurance invalid under certain circumstances of administrative re-rating.

III

The Government is not estopped to deny respondent's claim for benefits for total permanent disability occurring prior to the reinstatement of the insurance, as the court below held.

The respondent was granted insurance against prospective loss upon proof, required by the statute, that he was not totally and permanently disabled. The Government accepted the proof and has not at any time repudiated that agreement, on which the insurance was granted. It does not assert that he was totally and permanently disabled prior to the grant of insurance. It does not dispute the respondent's right to recover benefits for total permanent disability if such total permanent disability is proved to have occurred while the insurance was in force. Since it has not changed its position in any respect, either to its own advantage or the respondent's detriment, and merely denies liability upon any claim by the respondent

inconsistent with the agreed basis of the insurance, there is we submit no basis for holding it estopped.

The Government's position in this respect is consistent with the administrative practice, which has recognized liability in cases in which a failure to do so would have involved a repudiation of the agreement on which the insurance was based.

IV

The omission from the bill of exceptions of the incontestable clause of the policy was not a ground for affirmance of the judgment as the opinion of the court below suggests, since the rights of the parties in this respect were necessarily governed by the amendment to Section 307 of July 3, 1930, which is retroactive in effect and supersedes the clause contained in contracts issued prior thereto. Therefore, we submit that the bill contained all of the evidence necessary for consideration of the questions presented and thereby conformed to Paragraph 2, Rule 9 of the Circuit Court of Appeals for the Seventh Circuit.

ARGUMENT

I

THE STATUTE UNDER WHICH THIS CONTRACT WAS ISSUED AUTHORIZED INSURANCE PROTECTION ONLY, AND DID NOT CONTEMPLATE LIABILITY FOR OTHER THAN PROSPECTIVE LOSSES

The legislation relating to war risk and United States Government life insurance as embodied in both the War Risk Insurance Act and the World

War Veterans' Act indicates clearly, we think, that contracts of insurance were authorized for the protection of the insured against subsequent loss by total permanent disability or death, and that Congress did not intend in such contracts to authorize an assumption of liability for a loss already incurred.

The insurance sued upon was authorized by Section 300, World War Veterans' Act (Appendix, *infra,* pp. 40–42). This section corresponded in essential respects with Section 400, War Risk Insurance Act (Appendix, *infra,* p. 37), containing the first provision for the issuance by the United States of insurance against death and total permanent disability.

Section 400, War Risk Insurance Act, provided:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

Ordinarily "insurance" connotes protection against a contingent future loss, although in certain cases of marine insurance the parties recognize the possibility that the loss has occurred and specifically assume that risk. *Couch on Insurance,* Vol. 6, Sec. 1330. See also *Mayer* v. *Insurance Co.,* 121 Pa. Super. 475; *Clardy* v. *Grand Lodge of Oklahoma,* 132 Okla. 165; *John Hancock Mutl. L. Ins. Co.* v. *Hicks,* 43 Ohio App. 242; *Barnes* v. *Aetna Life Ins. Co.* (Tex. Civil App., 1928) 7 S. W. (2d) 946; *Dees* v. *National Cas. Co.,* 17 Tenn. App. 183; *Peoria Life Ins. Co.* v. *Smith,* 47 F. (2d) 279 (E. D. Mich.). We submit that, as used in the statutes here in question, "insurance" was intended to have its usual and ordinary meaning. *Lincoln* v. *Ricketts,* 297 U. S. 373, 376; *De Ganay* v. *Lederer,* 250 U. S. 376, 381. Certainly this was true as to the coverage against death.

The absence of Congressional intention to authorize payment of insurance benefits for total and permanent disability not occurring during the life of an insurance contract, may be inferred not only from an absence of language to support such a departure from usual insurance practice, but also from the fact that Congress specifically authorized the payment of benefits in two classes of cases for death or total permanent disability occurring at a time when no insurance was in force.

Section 401 of the War Risk Insurance Act (Appendix, *infra,* pp. 37–38) authorized the payment of

benefits (called automatic insurance) for loss incurred prior to application for insurance, and during a reasonable time allowed for making application. Cf. *United States* v. *Jackson,* No. 199, October Term, 1937, decided by this Court January 17, 1938. This section provided in part:

> Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: * * *.

Section 408 of the War Risk Insurance Act (Appendix, *infra,* pp. 39–40) authorized the payment of benefits for loss occurring after insurance had lapsed in certain cases where the policy might have been kept in force if the Government had made prompt payment of compensation due the insured.

(Comparable provisions were later embodied in Section 305, World War Veterans' Act, Appendix, *infra*, p. 45–46; cf. *United States* v. *Madigan*, 300 U. S. 500.) Section 408 provided in part:

> That where any soldier has heretofore allowed his insurance to lapse, while suffering from wounds or disease suffered or contracted in line of service, and was at the time he allowed his said policy to lapse entitled to compensation on account thereof in a sum equal to or in excess of the amount due from him in premiums on his said insurance, and has since died from said wounds or disease without collecting or making claim for said compensation, or being allowed to reinstate his said policy on account of his physical condition, then and in that event said policy shall not be considered as lapsed, and the Veterans' Bureau is hereby authorized and directed to pay to the beneficiaries of said soldier under said policy the amount of said insurance less the premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law.

The foregoing sections of the War Risk Insurance Act and the comparable sections of the World War Veterans' Act contain the only express provisions in the statutes authorizing the payment of benefits for loss incurred while insurance was not in force. We submit that they are properly to be construed as exclusive of any implication that ben-

efits for such loss are to be paid under any other circumstances.

Moreover, the statutory provisions for the reinstatement of insurance (Section 408, War Risk Insurance Act, Appendix, *infra,* pp. 39–40; Section 304, World War Veterans' Act, Appendix, *infra,* pp. 44–45), while extending the privilege of reinstatement to disabled veterans, expressly required proof that the applicant was *not totally and permanently disabled,* and are further evidence, we think, that an assumption of liability for loss already incurred was not intended.

Section 307, World War Veterans' Act (Appendix, *infra,* pp. 46–47), is especially significant for it specifically authorizes the payment of a claim under a contract of insurance existing prior to a reinstatement and conversion upon a finding that the insured is so entitled under such prior contract and upon a surrender of the subsequent contract. When this legislation was enacted it had long been known that suits on veterans' insurance contracts were being defended on the ground that there could be no recovery under a contract of insurance for total permanent disability antedating its issuance. An opinion of the Attorney General, dated July 18, 1919 (31 Op. A. G. 534) states:

> In cases which have heretofore arisen in the courts, I have advised the bureau that the insurance is collectible if applied for within the time allowed and before either total permanent disability or death has ac-

> tually occurred, and hence is not defeated by the fact that the applicant was mortally ill. However, what is provided for is a contract of insurance against something that may happen and not of indemnity for something which has already happened. If no application has been made when death occurs, of course there is no insurance; and if total permanent disability has been incurred, a future application for insurance can not cover it.

This defense, that the insurance did not cover a prior loss, had been sustained by the courts in two reported opinions (*Jordan* v. *United States,* 36 F. (2d) 43 (C. C. A. 9th); *Anderson* v. *United States,* 36 F. (2d) 45 (C. C. A. 9th)), and in several unreported opinions of District Courts (*Nold* v. *United States* (W. D. Mo.) July 1928; *Wilson* v. *United States* (W. D. Mo.) June 1929; *Oliver* v. *United States* (Arizona) August 1928).

Moreover, in other cases it had been held that a reinstatement or conversion of insurance constituted an estoppel against any claim that an earlier, superseded contract had matured. *Stevens* v. *United States,* 29 F. (2d) 904 (C. C. A. 8th); *United States* v. *Buzard,* 33 F. (2d) 883 (C. C. A. 9th); *United States* v. *Golden,* 34 F. (2d) 367 (C. C. A. 10th); *United States* v. *Acker,* 35 F. (2d) 646 (C. C. A. 5th); *United States* v. *Schweppe,* 38 F. (2d) 595 (C. C. A. 8th); *Duggan* v. *United States,* 36 F. (2d) 804 (Minn.). Congress apparently considered that a veteran, not entitled

under a contract of insurance to disability benefits for total permanent disability antedating its issuance, should be permitted to recover under any earlier contract if one of the contingencies insured against had occurred during the life of such earlier contract and enacted this legislation to overcome the decisions last cited. Cf. *United States* v. *Arzner*, 287 U. S. 470.

If Congress had considered that any reason existed for overcoming the holdings that no risk attached under an existing contract for total and permanent disability antedating its issuance, it seems reasonable to conclude that Section 307 would have contained some express provision enlarging the coverage to include losses incurred prior to the issuance of the contract on which the claim is based.

The effect of the judgment of the courts below is to interpret the statute as authorzing the issuance of matured contracts of insurance. The statutory requirement that an applicant furnish proof that he is not totally and permanently disabled, the statutory provisions relating to premium payments, and the regulations requiring due proof in support of a claim for disability benefits, are all effectively nullified, for evidence of the physical condition of the same person becomes satisfactory evidence that as an applicant for reinstatement he is not, and that as an insured he is, totally and permanently disabled as of the same date. The payment of disability benefits by the insurer is from the very out-

set substituted for the payment of premiums by the insured.

We submit that Congress has not, in any provision of the statutes, authorized the payment of insurance benefits for total permanent disability existing prior to any contract of insurance on which the claim is made; that the terms and conditions of the contracts as embodied in the regulations (See Appendix, *infra,* pp. 48–57) and the administrative practice (See letter to the Solicitor General from the Administrator of Veterans' Affiairs, dated October 6, 1937, Appendix, *infra,* pp. 58–67) have not[7] and could not enlarge the coverage provided by the statute (Cf. *Miller* v. *United States,* 294 U. S. 435; rehearing denied, 294 U. S. 734); and that the courts have correctly held, as the opinion of the court below concedes in its language, that "the risk did not cover disability existing prior to the date of the policy." (R. 60.) See *Jordan* v. *United States,* 36 F. (2d) 43 (C. C. A. 9th); *Anderson* v. *United States,* 36 F. (2d) 45 (C. C. A. 9th); *Hicks* v. *United States,* 65 F. (2d) 517 (C. C. A. 4th); *United States* v. *Kaminsky,* 64 F. (2d) 735 (C. C. A. 5th);[8] *United States* v. *Stevens,* 64 F.

[7] The language of the converted insurance contract (Appendix, *infra,* p. 53) does not expressly exclude total permanent disability occurring prior to insurance protection, as did the language of the original term contract (Appendix, *infra,* p. 50). We see no reason to believe that the Administrator thereby intended to enlarge the statutory coverage of the policy. Certainly he had no power to do so.

[8] The decision in *United States* v. *Chandler,* 77 F. (2d) 452 (C. C. A. 5th), cited in the opinion of the court below,

(2d) 853 (C. C. A. 8th); *United States* v. *McIver,* 77 F. (2d) 208 (C. C. A. 4th); *Schmidt* v. *United States,* 63 F. (2d) 390 (C. C. A. 8th); *Davis* v. *United States,* 57 F. (2d) 871 (E. D. Va.); *Nall* v. *United States,* 8 F. Supp. 69 (S. D. Miss.); *Stavros* v. *United States,* 3 F. Supp. 213 (W. D. Wash.).

II

DENIAL OF LIABILITY ON THE GROUND THAT THE LOSS INSURED AGAINST HAS NOT OCCURRED IS NOT A CONTEST WITHIN THE MEANING OF THE INCONTESTABLE CLAUSE IN SECTION 307, WORLD WAR VETERANS' ACT

The court below conceded that a disability existing prior to the inception of the policy was not covered by it (R. 60) but held, in effect, that the Government is precluded from denying liability to pay benefits under the policy, because of such disability, by the clause in Section 307, World War Veterans' Act, 1924, as amended July 3, 1930 (Appendix, *infra,* pp. 46–47), which provides in pertinent part that—

> policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance,

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rested upon a finding that there was no substantial evidence that the insured was totally and permanently disabled at any time. There was, therefore, no reason for application of the court's earlier ruling in the *Kaminsky* case. It is submitted that there is no basis for any contention that the decision in the *Chandler* case overruled the earlier holding in the *Kaminsky* case.

> reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, * * *.

It is submitted that the foregoing clause has no application where, as here, the validity of the policy is not questioned and liability under it is denied solely on the ground that a loss has not occurred during the period of insurance protection.

The incontestable clauses of commercial contracts have been construed in numerous decisions as precluding any attack upon the validity of the policies themselves but not as precluding the denial that claims arose under the policies.

The distinction between a denial that a policy covers the loss upon which a claim is based and a contest prohibited by a provision of the policy itself is clearly drawn in *Matter of Met. Life Ins. Co.* v. *Conway,* 252 N. Y. 449. See also *Mayer* v. *Insurance Co.,* 121 Pa. Super. 475, in which are collected numerous authorities to the same effect.

The Federal courts have likewise held that the incontestable clauses of commercial contracts are to be so interpreted. *Mack* v. *Connecticut General Life Ins. Co. of Hartford,* 12 F. (2d) 416, 418 (C. C. A. 8th), certiorari denied, 271 U. S. 687; *Sanders* v. *Jefferson Standard Life Ins. Co.,* 10 F. (2d) 143 (C. C. A. 5th); *Flannagan* v. *Provident Life & Accident Ins. Co.,* 22 F. (2d) 136 (C. C. A. 4th);

Hearin v. *Standard Life Ins. Co.*, 8 F. (2d) 202, 206 (E. D. Ark.); *Wright* v. *Philadelphia Life Ins. Co.*, 25 F. (2d) 514, 515 (E. D. S. C.).

Prior to the amendment of July 3, 1930, Section 307, World War Veterans' Act (Appendix, *infra*, p. 46), read in pertinent part as follows:

> All such policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, * * *.

and had been judicially construed, in accordance with the construction of comparable clauses in commercial policies, as not enlarging the coverage of the contracts to which it related. *Jordan* v. *United States*, 36 F. (2d) 43 (C. C. A. 9th), *supra*; *Anderson* v. *United States*, 36 F. (2d) 45 (C. C. A. 9th), *supra*. Cf. 31 Op. A. G. 534, *supra*, pp. 18–19, cited with approval in the *Jordan* case.

Certainly no intention to overcome the judicial construction of the language of Section 307, as it was worded prior to July 3, 1930, is disclosed in the amendment of that date which merely made the insurance incontestable from its effective date rather than six months later, and the judicial construction of the language of the incontestable clause subsequent to the amendment accords with that given prior to it. *Hicks* v. *United States*, 65 F. (2d) 517 (C. C. A. 4th); *United States* v. *Kaminsky*, 64 F. (2d) 735 (C. C. A. 5th); *United States* v. *Stevens*,

64 F. (2d) 853 (C. C. A. 8th); *United States* v. *McIver*, 77 F. (2d) 208 (C. C. A. 4th); *Schmidt* v. *United States*, 63 F. (2d) 390 (C. C. A. 8th); *Davis* v. *United States*, 57 F. (2d) 871 (E. D. Va.); *Nall* v. *United States*, 8 F. Supp. 69 (S. D. Miss.); *Stavros* v. *United States*, 3 F. Supp. 213 (W. D. Wash.). These decisions, after the amendment of July 3, 1930, are consistent with the established rule of statutory construction that the reenactment of legislation having a known judicial construction is presumed to adopt such construction. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500; *United States* v. *Falk*, 204 U. S. 143, 152.

A statute so clear on its face may be considered not to permit resort to the Committee Reports to determine its meaning (*Caminetti* v. *United States*, 242 U. S. 470), but if resort thereto is permitted these Reports (Appendix C, *infra*, pp. 68–69) will show that the amendment was for the express purpose of overcoming certain decisions of the Comptroller General. These decisions had denied payment of approved insurance claims for death or total permanent disability benefits in any case in which either death or total permanent disability had occurred within six months after reinstatement if there had been made at any time thereafter an administrative finding of total permanent disability prior to the reinstatement. The subsequent retroactive finding of total permanent disability in such cases was held to invalidate the re-

instatement. See *Forest Reed Hill,* 7 Comp. Gen. 431; *Frank Boehler,* 7 Comp. Gen. 248; *Philips McNish,* 7 Comp. Gen. 551; *Marion Artley,* 8 Comp. Gen. 387; *Mabray W. Woodall,* 9 Comp. Gen. 291; *Andy Stevens,* 7 Comp. Gen. 642. That the position of the Comptroller General was based entirely upon the right to contest the policy is clear from his decision in the case of *Joseph M. Giblin,* 8 Comp. Gen. 174, in which it was held that a retroactive rating of total permanent disability antedating insurance protection made after the period for contest had expired did not invalidate the policy and that benefits were payable by reason of such rating. The amendment of July 3, 1930, was thus clearly sufficient to overcome the effect of the decisions of the Comptroller General, but had no effect upon the Court decisions which had theretofore denied recovery for loss incurred prior to insurance protection and which were not based on the right to contest the policy (*supra,* pp. 24–25).

We submit, therefore, that the incontestable clause as worded in the amendment of July 3, 1930, does not have and was not intended to have the meaning which has been given to it by the court below; that the otherwise consistent judicial interpretation before and after the amendment of July 3, 1930, gives to the incontestable clause its proper meaning, and that it has no application where, as here, the validity of the insurance is not contested and the sole basis of denial is that the loss upon which the claim is based did not occur during the period of insurance protection.

III

THERE IS NO ESTOPPEL AGAINST THE DENIAL OF THE RESPONDENT'S CLAIM

The court below held that the Government was estopped to deny liability in this case because of the facts relating to the reinstatement and conversion of the insurance. (R. 59.) The statement of facts, made by the court as a basis for so holding, may be abbreviated in its own language as follows (R. 59):

> * * * the Government was better informed of the state of the physical and mental condition of the insured than Patryas was himself. * * * the insured, who occupied somewhat the status of a ward, was advised to apply for and secure reinstatement of the old war risk insurance policy. The ward consented to the payment of all premiums he had failed to pay since his discharge from service, through the imposition of a substantial lien against the reinstated policy. * * * After the reinstatement took place the insured, again apparently acting upon the advice of the Government, surrendered this insurance and took out the five year converted insurance policy. * * *
>
> Insured waived his right to claim such benefits [total permanent disability benefits under the earlier contract] and in return the Government reinstated the policy. The insured also waived his right to assert the absence of premiums due and consented to the creation of a lien equal to such premiums.

> The Government was again the gainer. [Matter in brackets ours.]

The opinion correctly states that the respondent "consented to the payment of all premiums he had failed to pay since his discharge from service, through the imposition of a substantial lien against the reinstated policy." (R. 59.) This was required by the statute as a condition to the reinstatement of insurance upon respondent's application. (Section 304, World War Veterans' Act, Appendix, *infra,* pp. 44–45.) The reinstatement according to the conditions of the statute was voluntary and by it the insured obtained insurance protection which he had theretofore lacked. Since by the reinstatement and contemporaneous conversion (likewise required by statute—Section 301, World War Veterans' Act, Appendix, *infra,* pp. 42–43) his position was improved, it is immaterial whether, as suggested by the court below (R. 59), Government agents induced the reinstatement and conversion and that the Government was in a better position than he to know the condition of his health.

The court below was in error in its statement (R. 59) that the respondent could not claim benefits under his original contract because of the subsequent reinstatement. Section 307, World War Veterans' Act (Appendix, *infra,* pp. 46–47), specifically authorizes a claim or suit on an earlier contract despite the existence of a subsequent contract and permits the recovery of payments thereunder upon a showing that the claimant became totally

and permanently disabled while the earlier contract was in force. See *United States* v. *Arzner*, 287 U. S. 470.

We submit that the Government has not at any time departed from the position to which it agreed when the respondent was granted the reinstated contract of insurance on which his claim is based, and that there is no basis for holding the Government estopped to deny that the contingency insured against occurred during the life of the reinstated insurance.

The reinstatement was obtained in June 1927, effective July 1, 1927. (R. 9, 20.) Prior to the reinstatement, the respondent was without Government insurance protection, as the earlier contract had lapsed August 31, 1919, for nonpayment of premiums. (R. 20.) So far as the record discloses, he had then made no claim under the lapsed contract and could not have sustained such claim. He was then disabled (R. 21), and presumably therefore could not have obtained commercial insurance. He was entitled to reinstatement of insurance under the World War Veterans' Act only upon proof satisfactory to the Director that he was not then totally and permanently disabled. (See Section 304, World War Veterans' Act, Appendix, *infra*, pp. 44–45.)

As the result of the reinstatement the respondent obtained protection against total permanent disability which might thereafter occur, the prospect of which was greatly increased by his recognized

disability (R. 21), and this protection is not defeated by the requirement that he prove that such subsequent loss has in fact occurred.

The reinstatement of insurance under Section 304, World War Veterans' Act, or the like provisions of Section 408, War Risk Insurance Act, upon the condition that an applicant be not totally and permanently disabled, has been characterized as an agreement of the parties, which neither may repudiate. *United States* v. *Buzard,* 33 F. (2d) 883 (C. C. A. 9th). The Government has certainly not repudiated the agreement in the instant case by denying that the insured is totally and permanently disabled (R. 8, 44), or by insisting that he prove that the loss which he claims occurred subsequent to the grant of insurance protection (R. 44). In fairness to the respondent it should be noted that in his petition he did not claim benefits for total permanent disability antedating the contract sued upon, but alleged that "afterwards and prior to, to-wit, January 26, 1931, he became totally and permanently disabled * * * so that said insurance matured on and prior to said January 26, 1931". (R. 14.)

It was held in *United States* v. *Buzard,* 33 F. (2d) 883 (C. C. A. 9th), *supra,* decided prior to the amendment of Section 307, World War Veterans' Act, on July 3, 1930 (*infra,* pp. 46–47), that a reinstatement of insurance precluded a claim that an earlier contract of such insurance had matured. The court therein stated (pp. 885–886):

> Total and permanent disability is often a question of great uncertainty and frequently it is incapable of conclusive proof. With all the ascertainable facts and circumstances before them, both laymen and scientific experts are sometimes at variance in their conclusions. But in the practical administration of the law junctures arise where it becomes necessary to make a determination for the future guidance of the parties in the performance of their obligations and in the assertion of their rights. If at such time the insured and the Government officers with all available information before them, in good faith agree upon resolving what both sides recognize as a doubtful issue, one way or the other, and upon the assumption that the status so agreed upon is correct, enter into a new contract to supersede the old and both thereafter act pursuant thereto, it would lead to intolerable confusion and often result in injustice, if now one, and then the other, party may, when his interests so dictate, repudiate the contract with the contention that the determination of the doubtful issue was erroneously made. The case would be not unlike an ordinary compromise where parties being in doubt as to their rights and obligations make a binding adjustment by mutual agreement.

See also: *Stevens* v. *United States,* 29 F. (2d) 904 (C. C. A. 8th); *United States* v. *Kusnierz,* 33 F. (2d) 887 (C. C. A. 9th); *United States* v. *Cross,* 33 F. (2d) 887 (C. C. A. 9th); *United*

States v. *Allen,* 33 F. (2d) 888 (C. C. A. 9th); *United States* v. *Schweppe,* 38 F. (2d) 595 (C. C. A. 8th); *United States* v. *Andrews,* 43 F. (2d) 80 (C. C. A. 10th).

Because of the holdings in these cases Section 307, World War Veterans' Act, was amended July 3, 1930 (Appendix, *infra,* pp. 46–47), to provide expressly that an insured, without prejudicing any rights under a reinstated contract, might elect to claim or sue under any prior contract and recover benefits if found entitled. Cf. *United States* v. *Arzner,* 287 U. S. 470. Whether, subsequent to the foregoing amendment, the rights of the parties are to be determined solely by the true facts without regard to any contrary agreement at the time of reinstatement as is suggested in *United States* v. *Stevens,* 64 F. (2d) 853, 857 (C. C. A. 8th), or, whether the estoppel stated in *Buzard* and other like cases, *supra,* operates except as the statute specifically provides otherwise is immaterial for the purposes of this case.

If, as is implicit in the holding of the court below, the Government is estopped to assert that the respondent was totally and permanently disabled prior to the reinstatement of insurance in defending against a claim under the reinstated contract (and it has not so asserted)[9] the respondent would appear to be equally estopped[10] from claiming that he was totally and permanently disabled prior to the reinstatement for the purpose of the reinstated contract, or that he is entitled to dis-

ability benefits under the reinstated contract by reason of any such prior disability, if in fact he was so disabled.

If, as we believe to be clear, the statute authorized insurance against prospective loss only, an insured does not state a case entitling him to benefits under a reinstated contract unless he alleges that subsequent to the reinstatement he became totally and permanently disabled and he does not prove a case entitling him to benefits under a reinstated contract unless he proves that subsequent to the reinstatement he became totally and permanently disabled.

The verdict of the jury finding that the respondent became totally and permanently disabled in 1924 did not resolve the single issue of the case as to whether the insured became totally and permanently disabled during the life of the contract, unless it may be considered as establishing the negative. Certainly the verdict provides no basis for the judgment which has been entered in the respondent's favor.

The administrative practice, with reference to reinstated contracts, appears to have been consistently fair to the insured. Either the Director has

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[9] The court states in its opinion (R. 59): "In fairness to appellant it should be said that it did not concede permanent and total disability to exist at this time."

[10] In *Litchfield* v. *Goodnow*, 123 U. S. 549, it was stated by this Court that: "Estoppels to be good must be mutual." See also *United States Fidelity & Guaranty Co.* v. *Ettenheimer*, 70 Neb. 144.

refrained from finding the facts with reference to the disability of an insured prior to the finding upon which a reinstated contract is based, as is the present practice, with exceptions not here pertinent (Appendix, *infra,* p. 66), or he has denied to a retroactive re-determination any effect, so far as it is inconsistent with the finding on which a reinstatement is based, as was the practice for many years subsequent to the memorandum of December 16, 1921 (Appendix, *infra,* pp. 59–61). In either case the insured is protected from the consequences of a mere difference of opinion on the part of rating officers. Either practice is consistent in its results with the views expressed in *United States* v. *Buzard,* 33 F. (2d) 883 (C. C. A. 9th), *supra.*

But if the Government is equitably bound by the agreement of the parties relative to the degree of disability of the respondent at the time of reinstatement, the respondent is likewise bound. He may not hold the Government to the agreement while he claims benefits upon a verdict wholly inconsistent with it.

IV

THE QUESTION PRESENTED WAS PROPERLY RESERVED FOR APPELLATE REVIEW

The Circuit Court of Appeals stated, as a possible ground for affirmance of the judgment of the trial court, that the bill of exceptions did not contain all of the evidence, particularly the incontest-

able clause of the contract. However, the court expressly refrained from making this the sole basis of the decision and, it is submitted, this ground would not justify affirmance. The omission from the bill of exceptions of the incontestable clause was entirely justified for the reason that the rights of the parties in this respect were necessarily governed by the amendment to Section 307 of July 3, 1930 (Appendix, *infra,* pp. 46–47), which is retroactive in effect and supersedes the clause contained in contracts issued prior thereto (Appendix, *infra,* p. 55). Otherwise, the bill contained all evidence necessary for consideration of the questions presented, and thereby conformed to Paragraph 2, Rule 9 of the Circuit Court of Appeals for the Seventh Circuit (Appendix D, *infra,* p. 70). Cf. *Gunnison County Commissioners* v. *Rollins,* 173 U. S. 255, 261; *United States* v. *Densmore,* 58 F. (2d) 748 (C. C. A. 9th), certiorari denied, 287 U. S. 590.

But, in any event, the question of which review is here sought was properly presented by the record proper, apart from the bill of exceptions. The terms of the contract may be ascertained from statutory provisions and regulations which, considered in connection with the verdict and judgment, present the question of whether liability attaches for a loss sustained prior to reinstatement and conversion of the policy. Although error was not specifically assigned to the entry of judgment on the verdict, the point was adequately covered by

assignments of error relating to other rulings involving the same question as that presented by the entry of judgment. Cf. *United States* v. *Bernays*, 158 Fed. 792, 794 (C. C. A. 8th).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

GOLDEN W. BELL,
Acting Solicitor General.
JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
Special Assistant to the Attorney General.
KEITH L. SEEGMILLER,
W. MARVIN SMITH,
Attorneys.

JANUARY 1938.

APPENDIX A—STATUTES

The contract sued on was issued subject to the World War Veterans' Act of June 7, 1924, as amended, which superseded the War Risk Insurance Act of October 6, 1917, as amended. The sections of both of these Acts deemed pertinent to an understanding of the question in this case are set forth below:

Section 400, War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 409:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department of Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

Section 401, War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 409:

> That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those per-

sons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service. Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

Section 404, War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 410:

That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as

declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

Section 408, War Risk Insurance Act, as amended August 9, 1921, c. 57, Sec. 27, 42 Stat. 156–157:

In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with, an application for reinstatement of lapsed or canceled yearly renewable term insurance or application for United States Government life insurance (converted insurance) hereafter made may be approved: *Provided,* That the applicant's disability is the result of an injury or disease or of an aggravation thereof suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing the service origin of the disability or aggravation thereof and that the applicant is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled

yearly renewable term insurance or United States Government life insurance (converted insurance) the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum compounded annually on each premium from the date said premium is due by the terms of the policy: *Provided further,* That where any soldier has heretofore allowed his insurance to lapse, while suffering from wounds or disease suffered or contracted in line of service, and was at the time he allowed his said policy to lapse entitled to compensation on account thereof in a sum equal to or in excess of the amount due from him in premiums on his said insurance, and has since died from said wounds or disease without collecting or making claim for said compensation, or being allowed to reinstate his said policy on account of his physical condition, then and in that event said policy shall not be considered as lapsed, and the Veterans' Bureau is hereby authorized and directed to pay to the beneficiaries of said soldier under said policy the amount of said insurance less the premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law.

Section 300, World War Veterans' Act, as amended May 29, 1928, c. 875, Sec. 13, 45 Stat. 967:

In order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department protection

for themselves and their dependents, the United States, upon application to the bureau and without medical examination, shall grant United States Government life insurance (converted insurance) against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided. Such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation: *Provided,* That any member of the reserve forces whose application was accepted at a time when he was in attendance at a military or naval training camp or station, and from whom premiums were collected, and who becomes or has become totally and permanently disabled, or who dies or has died, shall be deemed to have made valid application therefor. This proviso shall not authorize the granting of more than $10,000 insurance to any one person: *Provided further,* That each officer and enlisted man of the Coast Guard who is serving on active duty at the time of the passage of this amendatory Act, or who subsequent thereto enters the Coast Guard service, shall be granted insurance in accordance with the terms of this section upon application within one hundred and twenty days of the passage of this amendatory Act, or date of enlistment or entry into the Coast Guard, whichever is the later date, and before retirement, discharge, or resignation.

* * * * *

The United States shall bear the expenses of administration and the excess mortality

and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at 3½ per centum per annum. This section, as amended, shall be deemed to be in effect as of June 7, 1924.

Section 301, World War Veterans' Act, as amended June 2, 1926, c. 449, 44 Stat. 686, provides in part:

> Except as provided in the second paragraph of this section, not later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, and for reconversion of any such policies to a higher premium rate in accordance with regulations to be issued by the director, and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or be otherwise made at his election.
>
> All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927: *Provided, however,* That the director may by regulation extend the time for the continuing of yearly

renewable term insurance and the conversion thereof in any case where on July 2, 1927, conversion of such yearly renewable term insurance is impracticable or impossible due to the mental condition or disappearance of the insured.

* * * * *

The insurance except as provided herein shall be payable in two hundred and forty equal monthly installments: *Provided,* That when the amount of an individual monthly payment is less than $5, such amount may in the discretion of the director be allowed to accumulate without interest and be disbursed annually. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. All calculations shall be based upon the American Experience Table of Mortality and interest at 3½ per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months. Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries without the consent of such beneficiary or beneficiaries, but only within the classes herein provided.

* * * * *

Section 304, World War Veterans' Act, as amended July 2, 1926, c. 723, Sec. 15, 44 Stat. 799:

In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by the terms of the policy: *Provided further,* That where within one year of this amendatory Act all of the requirements for reinstatement of yearly renewable term insur-

ance under this section are complied with, except the payment of unpaid premiums with interest, and proof satisfactory to the director is furnished showing the applicant is unable to pay such premiums with interest or some part thereof, the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest-bearing indebtedness against the insurance, such indebtedness to bear interest at the rate of 5 per centum per annum, compounded annually, to be deducted in any settlement thereunder: *And provided further,* That no yearly renewable term insurance shall be reinstated after July 2, 1927.

Section 305, World War Veterans' Act, as amended May 29, 1928, c. 875, Sec. 17, 45 Stat. 971:

Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act as amended December 24, 1919, would purchase if applied as premiums when due, shall not be considered as lapsed, canceled or reduced; and the the United States Veterans' Bureau is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance less

the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law: *Provided,* That insurance hereafter revived under this section and section 309 by reason of permanent and total disability or by death of the insured, shall be paid only to the insured, his widow, child or children, dependent mother or father, and in the order named unless otherwise designated by the insured during his lifetime or by last will and testament: *Provided further,* That compensation which is uncollectible by reason of the provisions of section 310 of the War Risk Insurance Act, as amended, or section 210 of the World War Veterans' Act, 1924, as amended, shall be considered as uncollected compensation for the purposes of this section.

Section 307, World War Veterans' Act, June 7, 1924, c. 320, 43 Stat. 627:

All such policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums and subject to the provisions of section 23: *Provided,* That a letter mailed by the bureau to the insured at his last known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section: *Provided further,* That this section shall be deemed to be in effect as of April 6, 1917.

Section 307, World War Veterans' Act as amended July 3, 1930, c. 849, Sec. 24, 46 Stat. 1001:

All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date

of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: *Provided,* That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy: *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance.

APPENDIX B — REGULATIONS AND ADMINISTRATIVE PRACTICE

By Section 13 of the War Risk Insurance Act (c. 105, 40 Stat. 399) and Section 5 of the World War Veterans' Act, as amended July 3, 1930 (c. 849, Sec. 1, 46 Stat. 991), the Director of the Veterans' Bureau (now Administrator of Veterans' Affairs) was authorized to make regulations not inconsistent with the provisions of the Act for the purpose of executing and enforcing the same. Also, by Section 402 of the War Risk Insurance Act (c. 105, 40 Stat. 409), he was authorized and directed to determine upon and publish the exact terms and conditions of the contract. Pursuant to this authority, the following regulations were promulgated:

Bulletin No. 1, Treasury Department, promulgated October 15, 1917, provided in pertinent part:

> TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE
>
> I, William C. De Lanoy, Director of the Bureau of War-Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'an act to authorize the establishment of a Bureau of War-Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby, on this 15th day of October, 1917, by direction of the Secretary

of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

* * * * *

3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(Form of policy for $5,000.)

MILITARY AND NAVAL INSURANCE POLICY

No. 1.

Amount, $5,000.
Monthly installments, $28.75. Age, 25.

THE UNITED STATES OF AMERICA

TREASURY DEPARTMENT.

BUREAU OF WAR-RISK INSURANCE.

Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War-Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:

Hereby insures from and after the ____ day of ----------, 19__, John Doe, of Illinois, private, Company A, Third Infantry, conditioned upon the payment of premiums as herein provided, for the principal amount of $5,000, converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ per cent per annum) payable—

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability;

* * * * *

If the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against such disability.

* * * * *

Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted, a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid,

either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

* * * * *

Not later than five years after the war this policy, if written request be made to the bureau therefor, accompanied by this policy, will be converted without medical examination into any form of insurance selected from among those that may be prescribed by regulations of the bureau. Such converted insurance will be at net premiums, computed in accordance with the American Experience Table of Mortality and 3½ per cent interest per annum and will provide for cash, loan, paid-up, and extended insurance values.

Wherefore the United States of America has caused this policy to be signed by the Secretary of the Treasury and by William C. De Lanoy, the Director of the Bureau of War-Risk Insurance, and countersigned by the registrar or an assistant registrar of the bureau.

W. G. McAdoo,
Secretary of the Treasury.

William C. De Lanoy,
Director of the Bureau of War-Risk Insurance.

Countersigned at Washington, D. C., this ____ day of _____ 19__.

Registrar.

* * * * *

These terms and conditions are subject in all respects to the provisions of such act and of any amendments thereto and of all regu-

lations thereunder now in force or hereafter adopted.

WILLIAM C. DE LANOY,
Director of the Bureau of War-Risk Insurance.

WASHINGTON, D. C., *October 15, 1917.*

The policy sued on (five-year convertible term policy, Veterans' Administration Form No. 745) contains the following provisions:

THE UNITED STATES OF AMERICA
HEREBY GRANTS INSURANCE

of ---------- Dollars.

TO

---------- (the Insured.)

This insurance is granted in consideration of and subject to the terms and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of $------ on the ---------- day of each month for a period of sixty (60) months and thereafter the monthly premium of $------ on the ---- day of each succeeding month during the lifetime of the Insured except as hereinafter provided. Receipt of the first premium is hereby acknowledged.

This insurance is payable in monthly installments of $------ (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured this insurance is payable in accordance with the Optional Settlement so selected.

This insurance, subject to the beneficiary provisions hereof, is payable to ------, hereinafter called the beneficiary, ------.

Upon due proof of the total permanent disability of the Insured while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the Insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

Upon due proof of the death of the Insured while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any paid to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two hundred and forty or more installments shall have been paid to the Insured on account of total permanent disability, no death benefit shall be payable.

* * * * *

1. Premiums are due and payable monthly in advance in legal tender of the United States of America to the Treasurer of the United States in the City of Washington, District of Columbia.

(a) Premiums may be paid annually, semiannually, or quarterly, in advance, in which case the premium payable will be the sum of the monthly premiums for the period discounted at three and one-half per centum per annum. The discounted premiums for these periods are stated on the

first page hereof. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, if living; otherwise to the beneficiary.

(b) If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

2. For the payment of any premium under this policy, a grace of thirty-one days without interest will be allowed, during which time the policy will remain in force; but if the policy shall become a claim within the grace period, the unpaid premiums shall be deducted from the amount of insurance payable.

3. This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy.

* * * * *

8. At the maturity of this policy by total permanent disability or death, any indebtedness, unless paid off in cash, shall be liquidated by reducing the monthly installment

in the proportion which the indebtedness bears to the commuted value of the monthly installments, as may then be payable hereunder, excluding dividend accumulations. If the policy shall be payable in one sum at death, any indebtedness shall be deducted from the amount payable under the policy.

9. This policy shall be incontestable after the insurance has been in force for six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums, and the policy is issued free of restrictions as to travel, residence, occupation, or military or naval service. However, no insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy: *Provided,* That the cash value hereof less any indebtedness on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the Insured, the said value shall be paid to the estate of the Insured. (This provision was superseded by the amendment to Section 307 of the World War Veterans' Act, on July 3, 1930, *supra.*)

* * * * *

11. Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due

proof of total permanent disability, and within the six months, shall be refunded without interest.

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

12. Nothwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Director of the United States Veterans' Bureau of the continuance of such total permanent disability, and if the Insured shall fail to furnish such proof, all payments of monthly installments on account of such total permanent disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter the premium to be paid, and the cash values, paid-up insurance values, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The ex-

tended-insurance values shall be modified accordingly.

* * * * *

18. This policy may be exchanged for a policy of the same amount, bearing the same date and based on the same age, on any plan of insurance issued by the United States Veterans Bureau at a higher rate of premium, upon payment of the difference in reserve on this policy and the reserve on the new policy. Such exchange will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof.

(a) This policy may be exchanged for a policy of the same amount on any plan of insurance issued by the United States Veterans' Bureau at a higher rate of premium, upon payment of the current monthly premium at the attained age of the insured for the plan of insurance selected. The reserve (if any) on this policy will be allowed as a credit on the current monthly premium. Such exchange will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof.

* * * * *

21. This insurance is granted under and subject to the provisions of the World War Veterans' Act, 1924, and amendments and supplements thereto. No person, except the Director of the United States Veterans Bureau may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind the United States by making any promise respecting any benefits hereunder.

The administrative practice with regard to rights under reinstated insurance is set forth in the following letter from the Administrator of Veterans' Affairs:

VETERANS' ADMINISTRATION,
Washington, October 6, 1937.

Office of
The Administrator of
Veterans Affairs

Honorable STANLEY REED,
Solicitor General,
Department of Justice,
Washington, D. C.

MY DEAR MR. REED: You have advised me that you are considering the question whether or not to file a petition for a writ of certiorari in the case of *United States* v. *Stanley J. Patryas,* Circuit Court of Appeals for the Seventh Circuit, June 21, 1937, which involves the question whether or not total and permanent disability benefits are payable under a Government Life (Converted) Insurance Policy on account of a total and permanent disability which originated prior to the inception of the policy, and you ask to be advised fully as to the past and present administrative practice in cases involving the same question.

By a decision of September 3, 1921, 1 Comp. Gen. 108, the Comptroller General considered the question of reinstatements under Section 408 of the War Risk Insurance Act, as amended August 9, 1921, in relation to Section 411 of the War Risk Insurance Act, as amended August 9, 1921, the latter section making policies of insurance incontestable after six months from date of issuance or reinstatement except for fraud or non-payment of premiums. As the result

of the foregoing decision, the former General Counsel of the then Veterans' Bureau under date of December 16, 1921, promulgated the following instructions:

"In determining the validity and effect of reinstatement of insurance under the opinion of the Comptroller General of September 3, 1921, the following principles will be applied in all cases where the insured at the time of application for reinstatement, or thereafter, and during his lifetime was rated less than permanent total:

"(1) If the application for reinstatement was approved and the insured paid premiums for six months thereafter, a subsequent rating of permanent and total disability effective as of a date prior to the date of reinstatement will not affect the validity of the reinstatement notwithstanding that the insured died or allowed his insurance to lapse after the expiration of the six months. Payment of permanent and total disability benefits, however, under the policy, shall begin as of the date of the expiration of the six months period.

"(2) If the application for reinstatement was approved and the insured paid premiums for any period less than six months and during such period was declared permanently and totally disabled effective as of a date prior to the date of reinstatement, such rating will not affect the validity of the reinstatement, but the permanent and total disability benefits shall begin as of the date of the rating.

"(3) If the application for reinstatement was approved and the insured paid premiums for any number of months less than six, and during that period died with insurance in force, a subsequent rating of perma-

nent total disability effective as of a date prior to the date of reinstatement will not affect the validity of the reinstatement. The claim, however, will be treated as a death claim only and no permanent and total disability benefits awarded.

"(4) If the application for reinstatement was approved and insured paid premiums for any period less than six months, and during such period and after such approval, the application for reinstatement was rejected on the ground that the insured was not in as good health at the date of reinstatement as he was at the date of lapse, the reinstatement shall, nevertheless, be regarded as valid, and a subsequent rating of permanent total disability effective as of a date prior to the date of reinstatement will not affect the validity of such reinstatement.

"(5) The principles stated in the foregoing paragraphs one to four inclusive, will not be applied where the permanent and total disability is statutory as defined in Section 302, sub-section 3 of the War Risk Insurance Act.

"(6) If the application for reinstatement was approved and the insured paid premiums for any number of months less than six, and allowed his insurance to lapse, a subsequent rating of permanent and total disability effective as of a date prior to the date of reinstatement will invalidate the reinstatement.

"(7) If the application for reinstatement was never accepted and insured was subsequently rated as permanently and totally disabled effective as of a date prior to the attempted reinstatement, the rejection will be affirmed even though the insured has died and though the disease was of service origin

under which the insured might have been reinstated under the decision of the Comptroller General had he not been permanently and totally disabled.

"(8) This memorandum is not intended to cover cases where the first rating of less than permanent and total disability is made subsequent to the time of application for reinstatement, and also subsequent to the death of the insured. Cases of this character should be referred to the General Counsel to be handled specially.

"(9) The memorandum addressed by the General Counsel to the Board of Review October 26, 1921, is hereby modified in so far as it is in conflict with this memorandum."

The six months period for contest under Section 411 of the War Risk Insurance Act, as amended, was carried forward into the World War Veterans Act, 1924, as Section 307 until the amendment thereto of July 3, 1930. After the amendment of July 3, 1930, to Section 307 of the World War Veterans Act, the administrative policy of the Veterans Administration was that insurance was incontestable except for the grounds specifically enumerated in that Section from and after the date of issuance, reinstatement or conversion and that payments under such incontestable contracts or policies should begin from the date of maturity thereof. This principle was laid down in the opinion of the former General Counsel of July 21, 1930, in the case of Angelo Di Corti, XC–451,109, which was approved as a precedent for general application on August 6, 1930. This opinion was made the basis of Administrator's Decision No. 41 of April 10, 1931. As it is understood that the Bureau of War Risk Litigation of the Department

of Justice maintains a file of Administrator's Decisions, Administrator's Decision No. 41 is not quoted in full in this letter.

When this Administration received notice of the outcome of the Stevens case in the lower court and had been apprised of the fact that an appeal had been authorized in that case, the following instruction approved by the Administrator July 26, 1932 was issued; holding that in substance as to cases which would have been covered by Administrator's Decision No. 41 of April 10, 1931, the Veterans' Administration in view of the appeal to be taken in the Stevens case should cease maturing contracts of term insurance, reinstatements thereof or policies of Government insurance where it had been determined that the insured was permanently and totally disabled prior to the granting of the contract, its reinstatement or conversion. This instruction was in the form of a recommendation from the then Solicitor to the Administrator, here quoted:

"By your Decision No. 41, dated April 10, 1931, you held that a war risk term insurance contract in the amount of $10,000, which was reinstated effective September 1, 1920, was by virtue of the provision of Section 307 of the World War Veterans' Act, as amended, July 3, 1930, incontestable despite the fact that the insured was rated as permanently and totally disabled for insurance purposes from July 19, 1920, which it will be noted is prior to the reinstatement of the contract, and that payments thereunder should begin as of September 1, 1920, the effective date of the reinstatement.

"Following the above decision, the Administration has matured reinstated contracts of war risk term insurance and pol-

icies of Government Life Insurance as of their effective dates, notwithstanding that the insureds were rated as becoming permanently and totally disabled at a date prior to the reinstatements or conversions. This rule has been followed in cases where an insured who had reinstated and/or converted his insurance into a policy of Government Life Insurance, filed suit on his original term contract, and the Administration thereafter determined that he became permanently and totally disabled subsequent to the cessation of payment of premiums on the original contract but prior to the reinstatement or conversion, the practice in this character of case being to submit same on an agreed statement of facts which would permit a judgment maturing the reinstated contract or Government policy as of its effective date.

"In the case of Tom G. Larson (XC–1 345 278), the insured was granted a contract of insurance on February 1, 1918, which lapsed for non-payment of the premium due June 1, 1919. The Executor of his estate filed suit on the contract alleging that insured became permanently and totally disabled the first of November, 1918, and that the contract was thereby matured. At the trial of this suit, the court sustained the Government's motion for a directed verdict on ground that insured was permanently and totally disabled prior to the granting of the contract sued on and rendered judgment in its behalf.

"In the case of William M. Stevens (C–235,025), the insured made application for reinstatement of his lapsed contract of insurance on April 13, 1925, which reinstated contract lapsed for non-payment of the premium due August 1, 1926. He filed suit on

the reinstated contract alleging that same was reinstated on April 13, 1925; that he had been permanently and totally disabled ever since April 16, 1925, and that said contract was thereby matured. At the trial of this cause, the court found that the reinstatement was effective May 1, 1925; that insured was totally and permanently disabled on the first day of May, 1925, and as a matter of fact further found that insured became totally and permanently disabled some time in the year of 1920, and that insured was entitled to recover on his reinstated contract installments due thereunder from and after the first day of May, 1925. The Government sought judgment in this case on the ground that since, under the finding of the court, the insured was permanently and totally disabled prior to the granting of the reinstated contract, there was no loss thereunder and insured could not recover.

"The position of the Government in the Stevens case was grounded on the ruling in the Larson case above mentioned, which was, by the way, decided by the same court that tried the Stevens case. The court, however, declined to sustain the position of the Government in the Stevens case on the ground that since the Government had reinstated the contract it was precluded from going behind the reinstatement and showing that insured was permanently and totally disabled prior thereto.

"The Solicitor General has authorized an appeal from the decision in the Stevens case.

"In the case of John Bradshaw (C–392 647), the insured filed suit against the United States alleging that he was granted a contract of war risk term insurance and that he became permanently and totally

disabled while same was in force, thus resulting in its maturity. In its answer, the Government denied the granting of the contract sued on, and further answering averred that if the insured were totally and permanently disabled on the date of his discharge from the Army, he was as much disabled at the time of his induction into the military service of the United States as at any time subsequent thereto, and that he has suffered no loss. The insured moved to strike that part of the answer alleging that insured was disabled at the time he was inducted into the military service on the ground that same was a contest of the contract sued on. The court overruled the motion to strike and held that Congress never intended by Section 307, supra, to prohibit the defense that an insured was totally and permanently disabled prior to the date of his application for insurance.

"In view of the decisions in the Larson and Bradshaw cases, and the fact that the Solicitor General has authorized an appeal from the judgment against the Government in the Stevens case, it is recommended that until the appeal in the Stevens case is decided, the Administration cease maturing contracts of term insurance, reinstatements thereof, or policies of Government Life Insurance where the Administration has determined that the insured became permanently and totally disabled prior to the granting of the contract, its reinstatement, or conversion."

Subsequent to the determination of the appeal in the Stevens case, there was issued on January 22, 1934 by the Administrator, (signed and released February 2, 1934) the following memorandum:

"The practice of changing previous decisions or ratings which formed the basis for conferring upon applicants for insurance or for reinstatement thereof certain important insurable rights, necessitates the clarification of the administrative policy in respect to such prior decisions or ratings.

"The Veterans Administration may not, in fairness to policy holders, in the absence of fraud, reverse former decisions or ratings whereon was based an insurable right, contracted in good faith, unless the evidence of record clearly shows error as to which there might be no reasonable difference of opinion. Actions or ratings resulting in the approval of reinstatements of insurance by policy holders who were at the time shown to be suffering from any of the so-called statutory disabilities, or from patently terminal conditions from which no recovery could be possible, upon the basis of any sound medical theory, are examples of former decisions or ratings which are not protected under this instruction.

"You are therefore instructed that except as to the actions or ratings above described which, upon the basis of evidence of record when such actions or ratings were accomplished, clearly constituted error, any rating or action of the Bureau of War Risk Insurance, the Veterans Bureau or the Veterans Administration, whereon was based an insurable right, contracted in good faith, will, in the absence of fraud, be binding on the Board of Veterans' Appeals, and the Director of Insurance (Insurance Claims Council) and no rating hereafter will be made covering any period of time which would invalidate any such right."

No instructions have as yet been issued in view of the contrary decision in the Patryas case and the foregoing presents an outline of the past and present administrative practice in cases involving this question. If you should desire any further information which you may deem of assistance to you in the preparation of the proposed petition for a writ of certiorari to the United States Supreme Court in the Patryas case, you may be assured that any such request will receive thorough consideration.

Respectfully,

FRANK T. HINES (Signed)
FRANK T. HINES,
Administrator.

APPENDIX C—CONGRESSIONAL COMMITTEE REPORTS

The House Committee Report (H. Rep. 104, 67th Cong., 1st Sess. p. 11) accompanying the bill which contained the first statutory provision for incontestability (c. 57, Sec. 30, 42 Stat. 157, Aug. 9, 1921) stated in pertinent part:

> It is the opinion of your committee that a provision of this kind placed in the law would add stability to the policies issued or hereafter issued by the Government and give assurance that only in case of fraud or nonpayment of premiums would payment of the insurance be denied. A provision similar to this is usually found in the policies issued by private companies and has been found to be mutually beneficial to all concerned.

The Senate Committee Report (S. Rep. 1128, 71st Cong., 2nd Sess. p. 9–10) which accompanied the bill enacted to amend Sec. 307, World War Veterans' Act on July 3, 1930, stated in pertinent part:

> Section 24 amends section 307, which relates to the incontestability of insurance contracts. The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. This incontestability would protect contracts where they were not applied for within the time limit required, where the applicant was not in the required

state of health, or was permanently and totally disabled prior to the date of application, or for any other reasons except those specifically mentioned in the statute. It is appreciated that this is a broad provision, but it was felt that it was necessary in order to do justice to the veterans, to place this insurance on a parity with commercial insurance companies from a stability standpoint, and to overcome decisions of the Comptroller General which practically nullify the section as it now exists.

APPENDIX D—COURT RULES

Rule 9, Paragraph 2, of the Circuit Court of Appeals for the Seventh Circuit provides:

> Only so much of the evidence shall be embraced in the bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

NO. 445.

Office - Supreme Court, U. S
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FEB 10 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

UNITED STATES OF AMERICA, *Petitioner,*

v.

STANLEY J. PATRYAS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR STANLEY J. PATRYAS.

STEPHEN A. CROSS,
Chicago, Illinois.

WARREN E. MILLER,
Washington, D. C.,
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions below	1
Question presented	1
Statement	2
Summary of argument	4
Argument	5
Point One: Judgment was correctly entered from the Jury's verdict in view of	4-5
(a) The pleadings, and	4-5
(b) The facts	4-8
Point Two: The government is estopped from challenging the judgment	4-10
(a) Under the facts in this case	4-10
(b) As a mater of law (Section 307, World War Veterans' Act, 1924, as amended July 3, 1930)	4-12
(c) As the long continued contemporaneous construction placed upon the law by the administrative officers of the government charged with its enforcement should not be changed so as to disturb vested rights	4-22
Point Three: The legislation is remedial in nature and should be liberally interpreted so as to give effect to the intention of Congress	4-24
Point Four: The better considered decisions of the Circuit Courts of Appeal are in respondent's favor and the cases cited by petitioner do not correctly state the law applicable to this case	4-24
Conclusion	33

CITATIONS.

CASES:

	Page
Anderson v. U. S., 36 F. (2d) 45	23
Banks v. U. S., 36 F. (2d) 47	23
Beley v. Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 U. S. (L. ed.) 775	24
Bennett v. Butterworth, 11 Howard 669, at page 675	6
Bennett v. Harkrader, 158 U. S. 440, 39 L. ed. 1046	6
Chesapeake & Delaware Canal Co. v. U. S., 250 U. S. 126, 39 S. Ct. 407, 63 L. ed. 889	6
Cooke v. U. S., 91 U. S. 389, 398, 23 L. ed. 237	6
Duplex Co. v. Deering, 254 U. S. 443, 474, 51 S. Ct. 1172, 65 L. ed. 349, 16 A. L. R. 196	14
England Nat'l Bank v. U. S. (C. C. A. 8) 282, 121	6
Glazow v. U. S. (C. C. A. 2) 50 F. (2d) 178	24
Hicks v. U. S., 65 F. (2d) 517	26
Hollerback v. U. S., 233 U. S. 165, 34 S. Ct. 553, 58 L. ed. 898	5
Huntley v. Gile (C. C. A.) 32 F. (2d) 857	14
Jones v. New York Guaranty, etc. Co., 101 U. S. 622, 25 U. S. (L. ed.) 1030	24
Jordan v. U. S. 36 F. (2d) 43	23, 27
Kaminsky v. U. S., 64 F. (2d) 735	29
Lynch v. U. S., 292 U. S. 570, 78 L. ed. 1434	5
McNally, et al. v. U. S., (C. C. A. 8) 52 F. (2d) 440	24
National Lead Co. v. U. S., 252 U. S. 140	23
Ross v. Doe, 1 Pet. 665, 7 U. S. (L. ed.) 302	24
Schmidt v. U. S., 63 F. (2d) 390	28
Standard Oil Co. v. U. S., 267 U. S. 76, 45 S. Ct. 211, 69 L. ed. 519	5-6
Stavros v. U. S., 3 Fed. Sup. 213	27
Stevens v. U. S., 29 F. (2d) 904	33
Twenty Per Cent Cases, 13 Wall. 568, 20 U. S. (L. ed.) 707	24
U. S. v. Arzner, 287 U. S. 470	24
U. S. v. Bank of the Metropolis, 15 Pet. 377, 392, 393, 10 L. ed. 774	6
U. S. v. Barker, 12 Wheat 559, 6 L. ed. 728	6
U. S. v. Bostwick, 94 U. S. 53, 24 L. ed. 65	5
U. S. v. Chandler, 77 F. (2d) 452	24-30
U. S. v. Cox (C. C. A. 5) 24 F. (2d) 944	23-24
U. S. v. Crawford, 40 F. (2d) 199	23

Page

U. S. v. Jensen, 36 F. (2d) 47 23
U. S. v. LePage (C. C. A. 1) 59 F. (2d) 165 24
U. S. v. Padelford, 9 Wall. 531, 19 U. S. (L. ed.) 707. 24
U. S. v. Phillips (C. C. A. 8) 44 F. (2d) 689..... 24
U. S. v. Southern Pacific Railway Co., 184 U. S. 49, 22 S. Ct. 285, 46 U. S. (L. ed.) 425..... 24
U. S. v. Stevens, 64 F. (2d) 853 32
U. S. v. The Alabama Great Southern Railroad Co., 142 U. S. 615 23

STATUTES:

Act of August 9, 1921, Sec. 30, 42 Stat. 147, 157..... 13
Section 19, World War Veterans' Act, 1924, as amended, July 3, 1930 1
Section 304, World War Veterans' Act, as amended, July 3, 1926 11
Section 307, World War Veterans' Act, as amended July 3, 1930 4-6-12-31-32
26 R. C. L. 1437 5
31 Op. A. G. 534 22
32 Op. A. G. 379, January 4, 1921 .....12, 14

MISCELLANEOUS:

Administrator's Decision No. 41, promulgated April 10, 1931 22
H. R. Report No. 104, 67th Cong. 1st Sess., (H. R. Bill 6611) 14
H. R. Report No. 874, 71st Cong., 1st Sess., pp. 14-15.. 20
Report on Hearings on H. R. 10381, 71st Cong., 2d Sess., pp. 90-91 16
Senate Report No. 1128, 71st Cong., 2d Sess., pp. 9-10.19, 31
Artley, Marion, Jan. 23, 1929, 8 Comp. Gen. 387..... 31
McNish, Philip, Mar. 9, 1928, 7 Comp. Gen. 551..... 31
Woodall, Mary W., Jan. 16, 1930, 9 Comp. Gen. 291..17, 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 445.

UNITED STATES OF AMERICA, *Petitioner*,

v.

STANLEY J. PATRYAS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR STANLEY J. PATRYAS.

OPINIONS BELOW.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 57-60) is reported in 90 F. (2d) 715.

QUESTION PRESENTED.

Whether the judgment of the Circuit Court of Appeals was correct in holding that the facts in this case and the

applicable law, including the incontestable clause[1] estops the government from challenging the legality of this judgment.

STATEMENT.

On January 31, 1918 (R. 19-20) this insured was granted a $10,000 yearly renewable term war risk insurance contract which lapsed for nonpayment of premium due August 31, 1919. On June 28, 1927, he reinstated the full amount of this insurance and converted it into a Five-Year Renewable Term Policy of United States Government Life Insurance upon which premiums were paid to and including May, 1932. Claim for benefits of insurance under this converted insurance contract was filed with the Government on January 6, 1931, which claim was denied on November 21, 1931 (R. 10).

In the second count of the amended petition filed in this case upon which trial was had (R. 20) in suit instituted against the United States in the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to the provisions of Section 19, World War Veterans' Act, 1924, as amended[2] recovery was asked under

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[1] The World War Veterans' Act, as amended, July 3, 1930, provided: "Sec. 24. That section 307 of the World War Veterans' Act, 1924, as amended (section 518, title 38, United States Code), be hereby amended to read as follows:

'Sec. 307. All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be *incontestable* from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: * * * *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance'." (Italics supplied)

[2] Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, provides: "Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons

respondent's United States Government Life Insurance Contract, because of total and permanent disability occurring according to said petition, after reciting the issuance of said contract (R. 14)—

> "afterwards and prior to, to wit, January 26, 1931."

To this petition, petitioner pleaded (R. 9):

> "The defendant denies that the plaintiff became totally and permanently disabled on or prior to January 26, 1931, and denies further that the said United States Government Five-Year convertible term policy matured on or prior to January 26, 1931."

At the conclusion of all of the evidence (R. 44) the government moved the court to return a verdict in favor of defendant on account of the alleged failure of plaintiff to adduce substantial evidence of permanent and total disability while his insurance contract was in force; and upon the ground that if there was proof of permanent and total disability, same existed since 1924 and the policy upon which suit was brought was in effect until 1927. The court overruled this motion (R. 45) and upon the issue framed by the above mentioned pleadings the case was submitted to a jury who returned in respondent's favor the following verdict (R. 48):

> "We, the Jury, find the issues for the plaintiff, and fix the date of permanent and total disability at the latter part of 1924."

Thereafter, the Court overruled petitioner's motion theretofore made for a directed verdict and for findings of fact and conclusions of law (which proposed findings and

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claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *."

conclusions are not contained in the record now before this Court) to which action respondent excepted (R. 48).

The Circuit Court of Appeals affirmed (R. 57-60).

Certiorari was apparently granted because of a conflict between decisions of Circuit Courts of Appeal as to the effect to be given to an Act of Congress, no opposition to the government's petition for certiorari having been filed in this cause.

SUMMARY OF ARGUMENT.

Point One.

Judgment was correctly entered upon the jury's verdict in view of

(a) The pleadings, and

(b) The facts.

Point Two.

The Government is estopped from challenging the judgment

(a) Under the facts in this case.

(b) As a matter of law (Section 307, World War Veterans' Act, 1924, as amended July 3, 1930).

(c) As the long continued contemporaneous construction placed upon the law by the administrative officers of the Government charged with its enforcement should not be changed so as to disturb vested rights.

Point Three.

This legislation is remedial in nature and should be liberally interpreted so as to give effect to the intention of Congress.

Point Four.

The better considered decisions of the Circuit Courts of Appeal are in respondent's favor and the cases cited by petitioner do not correctly state the law applicable to this case.

ARGUMENT.

Point One.

Judgment was correctly entered upon the jury's verdict in view of

(a) The pleadings.

No allegation is made in any of the pleadings of permanent and total disability in 1924. Respondent had opportunity to plead that this insured became totally and permanently disabled in 1924, if so advised, but neglected to do this. Therefore, respondent is now barred from raising this defense as is here attempted.

In the case of *Lynch* v. *United States,* 292 U. S. 570, 78 L. ed. 1434, at page 579, this court held:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

In an earlier case, *Standard Oil Co.* v. *United States,* 267 U. S. 76, this court held:

> "When the United States went into the insurance business, issued policies in familiar form, and provided that, in case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."

The rule is well settled that in the construction and interpretation of Government contracts the same general rules apply as in the case of contracts between individuals. 26 R. C. L. 1437; *Hollerback* v. *United States,* 233 U. S. 165, 34 S. Ct. 553, 58 L. ed. 898; *U. S.* v. *Bostwick,* 94 U. S. 53, 24 L. ed. 65. "* * * And the rule is well settled that, when the 'government * * * comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.' "

Cooke v. *U. S.*, 91 U. S. 389, 398, 23 L. ed. 237; *Standard Oil Co.* v. *U. S.*, 267 U. S. 76, 45 S. Ct. 211, 69 L. ed. 519; *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 126, 39 S. Ct. 407, 63 L. ed. 889; *U. S.* v. *Bank of the Metropolis*, 15 Pet. 377, 392, 393, 10 L. ed. 774; *U. S.* v. *Barker*, 12 Wheat. 559, 6 L. ed. 728; *England Nat'l Bank* v. *U. S.* (C. C. A. 8th) 282, 121.

It will be seen that the issue as framed by the pleadings was whether the insured became permanently and totally disabled *after* the issuance of this converted insurance contract, *and prior to January 26, 1931.*

> "Now, if anything is settled in proceedings at law where a jury is impaneled to try the facts, it is, that the verdict must find the matter in issue between the parties, and the judgment of the court must conform to and follow the verdict." *Bennett* v. *Butterworth*, 11 Howard 669, at page 675.

The court reserved his ruling upon petitioner's requested instruction relating to permanent and total disability existing before the policy was applied for and did not instruct the jury on this point. As the contract sued upon was incontestable from date of issuance by virtue of the provisions of Section 307, World War Veterans' Act, 1924, as amended, it is clear that the requested instruction of petitioner relative to permanent and total disability before this contract was issued was improper and the trial court was correct in rejecting this contention. Therefore that part of the verdict reading "and fix the date of permanent and total disability at the latter part of 1924" (R. 48) should be rejected as mere surplusage. It relates to something more than the issue presented by the pleadings and was not before the jury. This verdict amounted to a general verdict for plaintiff upon the issues as framed by the pleadings.

The verdict in this case has the same effect as given by this Court to verdict in the case of *Bennett* v. *Harkrader*, 158 U. S. 440, 39 L. ed. 1046. In that case the statute un-

der which suit was instituted required the jury in an action for the possession of real estate to find as follows:

> "* * * if the verdict be for a plaintiff that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be."

The verdict in that case did not state in terms that the plaintiff was entitled to the possession of the property described in the complaint, or any part thereof; neither did it state the nature or duration of his estate in the property. Hence, it was insisted that the verdict was irregular and no judgment should be rendered thereupon. This Court in that case stated:

> "We do not think the defect, if it be one, is sufficient to vitiate the judgment. *Where the complaint alleges that the plaintiff is entitled to the possession of certain described property,* which is unlawfully detained by the defendant and the possession of which the plaintiff prays to recover, *a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint.* * * * It would be purely surplusage to find in terms a priority of the right to purchase when that is the only question which can be litigated in such statutory action." (Italics supplied)

In the instant case as in the above mentioned case, we submit, that the part of the verdict reading—

> "We, the Jury, find the issues for the plaintiff (R. 48)"

amounts to a general verdict for the plaintiff and is sufficient for him to recover upon the facts set forth in the complaint; the remainder of said verdict is purely surplusage and the action of the lower courts should be here sustained.

Judgment was correctly entered upon the jury's verdict in view of

(b) The facts.

We take the position that it is not material under the issues made by the pleadings as to whether there is substantial evidence of permanent and total disability after the converted insurance contract herein sued upon became effective. However, should this Court feel constrained to examine into the evidence we maintain there is substantial evidence that this insured's disability became total and permanent *after* July 1, 1927.

The witness Schuttenmahier testified (R. 27-28) that between 1925 and 1931 Patryas "looked much worse. He was weaker." In 1931 in addition to other complaints, according to Schuttenmahier, Patryas "complained of headaches. Would be unconscious. There wasn't any life in him." Also in 1931 "when they went out for a walk things didn't look right to Patryas and he wondered why people stared at him," and when they would go out for a walk then he would have to hold Patryas up when he would get a sweating spell.

Conditions described by Mrs. Patryas clearly showed a changed condition after the mastoid operation on July 19, 1927 (R. 37). After that "he would get into a rage and choke me and throw things at me and would mistreat the children," and in 1929 he would not visit with people and would not go out alone. Took walks oftener in 1926 and 1927 than he did later. Would get crying spells and "get up in a fit, mistreat the children, etc."

The contract (R. 20) defined total permanent disability as follows:

> "Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is

founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. * * *"

If for the sake of argument it should be conceded that the petitioner's claim that the insured was totally disabled within the meaning of the contract, from 1924 up to July, 1927, still there is nothing to justify the contention that such "total disability" was "permanent" within the meaning of the last above quoted clause in the definition. The fact that the Government hospitalized him for a long period of time in 1927 and performed a mastoid operation in July of that year indicates that then there existed hope of improving his condition. The fact that his condition did not improve but became worse in many ways after this operation shows that it was not reasonably certain prior to the operation that he would not improve and again adjust himself to civil life in some gainful occupation. We suggest that the mastoid operation demonstrated that his trouble was an organic brain disease which by that time became incurable as testified to by Dr. Hulbert (R. 38-40).

Even though plaintiff may have been unable to work before 1927 still it was not then "reasonably certain that the total disability will continue" throughout his life. Not until after it was demonstrated by the mastoid operation that his trouble was not caused by the mastoid condition was it reasonably certain that the condition would continue, and therefore be permanent within the meaning of the definition of permanent disability as fixed by the policy (R. 20).

It is to be noted that plaintiff's disabilities according to the defendant's own reports prior to 1927 showed a condition of psychoneurosis neurasthenia on a constitutional inferiority basis (R. 22). The jury in this case intended for plaintiff to recover. By their verdict and judgment they undoubtedly adopted the theory of disability as testified to by Dr. Hulbert, that is, a disability of the brain and of

the mind from an organic shellshock which impaired him mentally and that on or before December, 1930, and after 1927 he could not be gainfully employed and his condition would not improve (R. 38-39).

Point Two.

The Government is estopped from challenging the judgment.

(a) Under the facts in this case.

The government took the position in all of its conduct prior to trial that respondent was never permanently and totally disabled. This position was taken in reinstating this insurance, in denying this claim of permanent and total disability before suit as well as denying in its answer filed in court the fact of the insured's total and permanent disability "on or prior to January 26, 1931", thereby contending this insured was never totally and permanently disabled. Too, the government knew the insured's condition at the time his insurance was reinstated because he was then in a government hospital receiving treatment from government physicians. The government, the facts disclose, was better informed of the insured's health than was the insured himself.

It was stipulated (R. 19-20) that on January 31, 1918, respondent was issued a $10,000 contract of yearly renewable term insurance which lapsed for nonpayment of premium due August 31, 1919; and that on June 28, 1927, this $10,000 insurance contract was reinstated and converted into a Five-Year Convertible term policy. This reinstatement was effected by creation of a lien of $773.90 covering payment of premiums from date of lapse until date of reinstatement, with interest, effective July 1, 1927, under the liberal provisions of law permitting veterans suffering from injury or

disease contracted in the active military or naval service during the World War.[3]

It will be observed that as a condition to this reinstatement it was necessary that the Director of the Veterans' Administration find as a fact that respondent was *not to-*

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[3] The amendment of the World War Veterans' Act of July, 3, 1926, provided: "Sec. 15. That section 304 of the World War Veterans' Act, 1924, approved June 7, 1924, is hereby amended to read as follows: 'Sec. 304. In the event that all provisions of the rules and regulation other than the requirements as to the physical condition of the applicant for insurance have been complied with and application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further, That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled.* As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by the terms of the policy; *Provided further,* That where within one year of this amendatory Act all of the requirements for reinstatement of yearly renewable term insurance under this section are complied with, except the payment of unpaid premiums with interest, and proof satisfactory to the director is furnished showing the applicant is unable to pay such premiums with interest or some part thereof, the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest bearing indebtedness against the insurance, such indebtedness to bear interest at the rate of 5 per centum per annum, compounded annually, to be deducted in any settlement thereunder: *And provided further,* That no yearly renewable term insurance shall be reinstated after July 2, 1927'." (Italics supplied.)

tally and permanently disabled at time of reinstatement on June 28, 1927. Premiums were thereafter paid by respondent on his contract of insurance and accepted by petitioner without question for a period of five years, through May, 1932.

Ample opportunity was afforded petitioner before the evidence in this case was presented, to raise the defense here urged. Petitioner failed and neglected to do this. Petitioner's position with respect to respondent's disability for a period of five years preceding this suit, as evidenced by its receipt each month of the premium payments made by respondent, its re-instatement and conversion of respondent's insurance contract and its denial of respondent's permanent and total disability on or prior to January 26, 1931, has consistently been that respondent was not totally and permanently disabled over this period of time. For petitioner to wait until after all the evidence was presented in this case to then attempt to raise the defense that respondent was totally and permanently disabled before this contract of insurance was issued, when it was then too late for respondent to combat a defense of this character, after respondent had been lulled into a sense of security, would not only be eminently unfair but would operate as placing a premium upon such action on the part of Government officials. Certainly this court should not permit respondent to thus take advantage of his own wrongs.

The Government is estopped from challenging the judgment

(b) As a matter of law (Section 307, World War Veterans' Act, 1924, as amended July 3, 1930).

The Attorney General of the United States, on January 4, 1921 (32 Op. A. G. 379-390), ruled as follows:

> "* * * where * * * a soldier protected by term insurance, who has suffered disability which has been rated by the Bureau of War Risk Insurance as less than total

> permanent, applies for conversion, and same is granted, the conversion is good, for thereafter the soldier will be estopped from claiming, *and the War Risk Insurance Bureau will be estopped from finding as a fact, that at the time of conversion the applicant for conversion was totally and permanently disabled and therefore ineligible for same.*" (Italics supplied)

The legislative history of the incontestability provision clearly shows that it was the intention of Congress to make all contracts of insurance incontestable.

The Government is estopped, as a matter of law, by virtue of the provisions of Section 307, World War Veterans' Act, 1924, as amended, from challenging this judgment.

It is a legal presumption that one is not permanently and totally disabled when he applied for conversion of his insurance, whatever the evidence may show as to his state of health at that time. This presumption is required by the incontestability provision of the law, as construed and applied by the Veterans' Bureau, and as it was intended by Congress to operate, according to the Committee reports on the original incontestability provision in the Act of August 9, 1921 and on said provision as amended by the Act of July 3, 1930.

The first incontestability provision was contained in the Act to establish the Veterans' Bureau, approved August 9, 1921 (42 Stat. 147, 157). Section 30 of said Act added the following as a new section to Article IV of the War Risk Insurance Act:

> "Section 411. Subject to the provisions of Section 29 of the War Risk Insurance Act and amendments thereto policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums."

In construing this section it is to be borne in mind that, as the Attorney General had held in his said opinion of

July 18, 1919, original war risk term insurance could not validly be issued to a person who was totally and permanently disabled. It is also to be remembered that, under Bureau regulations and the opinions of the Attorney General, such insurance could not validly be reinstated or converted if at the time of application therefor the applicant was totally and permanently disabled.

Thus, in his opinion to the Secretary of the Treasury, dated January 4, 1921 (32 Op. A. G. 379) the Attorney General had also held, according to the headnote to said opinion:

> "A policy of term insurance matures into a claim upon the occurrence of either the death or total disability of the insured, and after the happening of either of these events there is no term insurance left which is subject to conversion under the terms of the War Risk Insurance Act."

And by Section 408 of the War Risk Insurance Act, also added to said statute by the Act of August 9, 1921, Congress provided specifically for the reinstatement and/or conversion of war risk insurance upon the condition, among others, that the applicant, in his lifetime, submitted proof satisfactory to the Director of the Veterans' Bureau that he was not totally and permanently disabled.

The right of the courts to look to the reports of committees of Congress to ascertain the legislative intent, where the meaning of the statute is obscure or doubtful is well settled. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474, 51 S. Ct. 1172, 65 L. ed. 349, 16 A. L. R. 196; *Huntley* v. *Gile* (C. C. A.) 32 F. (2d) 857.

The purpose of adding said Section 411 to the War Risk Insurance Act was thus stated in House Committee Report No. 104, 67th Congress, 1st Sess. on H. R. Bill 6611, which became said Act of August 9, 1921:

> "Section 29 provides that, subject to the provisions of section 29 of the war risk insurance act and amend-

ments thereto, policies of insurance heretofore or hereafter issued in accordance with Article IV of the war risk insurance act, shall be incontestable after six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums.

It is the opinion of your committee that a provision of this kind placed in the law *would add stability to the policies* issued or hereafter issued by the Government *and give assurance that only in case of fraud or nonpayment of premiums would payment of the insurance be denied.* A provision similar to this is usually found in the policies issued by private companies and has been found to be mutually beneficial to all concerned." (Italics supplied.)

Senate Committee Report No. 231 on bill H. R. 6611 incorporates therein said House Report No. 104, which, it said, "describes each section of the bill as it passed the House and is hereto appended and made a part of this report."

The statement in said House Committee Report No. 104 that a provision of the kind embodied in Section 411 "would add stability to the policies issued or hereafter issued by the Government *and give assurance that only in case of fraud or nonpayment of premiums would payment of the insurance be denied,*" shows that the incontestable provision was intended to be liberally construed.

And it appears that the Veterans' Bureau, from the passage of the Act of August 9, 1921, construed and applied the incontestability provision accordingly; that is to say, after the six months period of contestability had elapsed, the Veterans' Bureau held that the Government was obligated to pay the insured the disability allowances authorized by his policy, regardless of the fact that the total and permanent disability from which it found him to be suffering might have occurred prior to his application for such insurance, whether original, reinstated or converted.

That such was the contemporaneous, uniform and long-continued practical construction of the incontestability pro-

vision also appears from the statement of General Hines, Administrator of Veterans' Affairs, and Mr. Roberts, the Solicitor of Veterans' Affairs, before a Senate committee in support of the bill which led to the adoption of the amendments to Section 307 of the World War Veterans' Act, 1924, made by the Act of July 3, 1930 (the provisions of Section 411 of the War Risk Insurance Act, as amended March 4, 1923, having been incorporated in the World War Veterans' Act, 1924, as Section 307). The following quotation from the hearings before the Sub-committee of the Senate Committee on Finance on H. R. 10381, 71st Cong. 2d Sess. (Hearings, pp. 90-91) is significant (Italics supplied):

> GEN. HINES. Section 23 of the bill amends section 307 of the act by making all contracts of insurance issued by the Government incontestable from date of issuance except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces. This is a very sweeping amendment and will place beyond contest many contracts and policies of insurance which otherwise would be contestable. It is a well recognized principle of commercial insurance companies, however, *and in reality is only a clarification of the existing law which was practically nullified by a recent decision of the Comptroller General.* It is believed that some such provision is necessary to stabilize Government insurance, and to insure to the veteran and his beneficiary the payment of the insurance at date of permanent and total disability.
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> I would like to have Mr. Roberts explain the decision of the comptroller and its effect, if he may.
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> MR. ROBERTS. Mr. Chairman, the present World War Veterans' Act of 1924, as amended, contains a provision to the effect that where a policy is maintained in force for a period of six months, it should be incontestable, except for fraud or nonpayment of premiums. *We have followed that, and in all cases where the policy has remained in force for six months we have paid the claim, irrespective of the merits of it,* unless there

was fraud or failure to pay premiums. The only cases that have been excepted from that section of the act were where the man originally did not have the right to apply for the insurance, such as a man who was not in the military service, who erroneously made an application, and through an error it was accepted. However, under date of January 16, 1930, *notwithstanding the long practise of the bureau,* the Comptroller General, in the case of Mabry W. Woodall, held that if a man was permanently and totally disabled at the time he applied for reinstatement of insurance, or conversion of insurance, no matter if he paid the premiums for 10 or 15 years, if the bureau was to administratively *then* determine that *10 years before* he had been permanently and totally disabled at the time he applied, the policy was not incontestable, the statute did not protect it, and the man would have no rights, or his beneficiary would have no rights, whichever was the case.

This was, of course, an overturning of a practise not only in the bureau, but a practise which obtains with all commercial insurance companies. The very purpose of an incontestable clause is to give some stability to the policies, and while the amendment was not recommended by the bureau, we felt the weight and force of the argument in favor of it."

The decision of the Comptroller General in the *Woodall Case,* to which General Hines and Mr. Roberts referred, was rendered January 16, 1930 (9 Comp. Gen. 291). The facts of that case as stated in said decision were as follows: Woodall applied on July 2, 1927 for the reinstatement and conversion of his lapsed policy of war risk term insurance. October 3, 1927, the application for reinstatement was marked "acceptable" and in January, 1928, a policy was issued effective July 1, 1927. The veteran died on February 11, 1928, and on January 9, 1928, the veteran was found permanently and totally disabled on November 21, 1927, by reason of tuberculosis. June 2, 1928, the appeal group on central office cases found the veteran permanently and totally disabled from April 20, 1925, a date prior to his

application for reinstatement and conversion. September 10, 1928, the Director approved a recommendation of the advisory group on appeals of August 23, 1928, which confirmed the onset of the permanent and total disability from April 20, 1925, to the date of death. The Comptroller General held that the converted insurance lapsed on August 1, 1927, one month after its effective date, and that the permanent and total disability rating of Woodall made by the Bureau on January 9, 1928, stopped the running of the period of six months fixed by Section 307 of the World War Veterans' Act, 1924, for contesting Government insurance. Even if there had been no lapse, the Comptroller General said, certain decisions of the Federal Courts cited by him would have to be considered, observing:

> "* * * These decisions seem to place the happening of permanent and total disability on exactly the same basis as the happening of death, and if either has in fact occurred prior to application, reinstatement or conversion of insurance, there is nothing under the provisions of the World War Veterans' Act on which to issue insurance, and if, through a mistake, a policy has issued to one in fact dead or permanently and totally disabled, the Government may not be obligated thereunder."

Referring further to decisions of the Federal Courts, the Comptroller General said (Italics supplied):

> "These decisions not only sustain the views of this office, but go further and place *no time limitation* on the Veterans' Bureau within which there may be determined that the insured was in fact permanently and totally disabled when originally applying for insurance or applying for reinstatement and/or conversion thereof. * * *
>
> Accordingly, the rule may be stated that where the Veterans' Bureau has heretofore established or may hereafter establish the condition of permanent total disability at or prior to the date of original application for insurance, or application for reinstatement and/or

conversion of insurance *by a rating made at any time prior to the first payment of insurance under the policy,* the insurance should be considered as invalid and no payments made thereunder, leaving the parties in interest to their recourse in the United States courts as provided by the statute."

It was to overcome this sweeping decision of the Comptroller General and to reestablish the previously existing and long-continued practice of the Veterans' Bureau, that the Veterans' Administration itself sought the amendment of Section 307 of the World War Veterans' Act made by the Act of July 3, 1930, making "all contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted" incontestable from date of issuance, except for fraud, or nonpayment of premiums.

Senate Report No. 1128, 71st Cong. 2d Sess., on H. R. Bill 13174, which became the Act of July 3, 1930, states (pp. 9-10):

"Section 24 amends section 307, which relates to the incontestability of insurance contracts. The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. *This incontestability would protect contracts where they were not applied for within the time limit required, where the applicant was not in the required state of health, or was permanently and totally disabled prior to the date of application, or for any other reasons except those specifically mentioned in the statute.* It is appreciated that this is a broad provision, but it was felt that it was necessary in order to do justice to the veterans, to place this insurance on a parity with commercial insurance companies from a stability standpoint, and to overcome decisions of the Comptroller General which practically nullify the section as it now exists. Further provision is made permitting the insured to elect after a reinstatement or conversion to go back to some prior contract and claim rights there-

under; and if he proves himself entitled to such rights, upon surrender of the latter contract or contracts, to be paid under the prior contract. *The purpose is to prohibit the raising of estoppel against the claimant either in or out of the courts because of his reinstatement or conversion of his insurance.* Provision is also contained whereby suit may be brought either in the original action, or by alternative plea in the same suit with a subsequent contract of policy. Recovery, however, can only be effected upon one of the contracts or policies. The effect of the present practice of the bureau in raising estoppel is to penalize the man who pays his premiums or tries to continue all or a part of his insurance in force. This amendment is specifically made retroactive in order that in any case where the claim has been heretofore disallowed on the ground of estoppel, or because of the policy not being incontestable, the insured, or the beneficiary under such contract or policy may, if he/she so elects, have the benefit thereof. It is contemplated that payments in cases of contracts or policies incontestable under this section will begin from date of maturity of such contracts or policies."

House Report No. 874, 71st Cong. 1st Sess. (pp. 14-15) used the same identical language with respect to the like provision in H. R. Bill 10381 for which H. R. Bill 13174 was substituted.

Reading the italicised statement in said Senate Report as to the purpose of the amendment to the incontestability provision of Section 307 in the light of the construction which the Veterans' Bureau had placed upon such provision from the time of the passage of the Act of August 9, 1921, in which it first appeared, as well as in the light of the Comptroller General's decision in the Woodall case, as to both of which matters said Committees appear to have been advised, there is no escaping the conclusion that said Committees understood, and Congress must be presumed to have intended, that the amendment to the incontestability provisions of Section 307 then under consideration would

preclude the Government from denying liability on any insurance contract or policy theretofore or thereafter issued on the ground that the insured was totally and permanently disabled prior to its issuance, reinstatement or conversion.

The provision of Section 307, as amended July 3, 1930, that "the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or bring suit under section 19 of this Act on any prior contract or policy," is in accord with the statement in said Committee Reports as to the purpose of making any such contract or policy incontestable from date of issuance. The incontestability provision, as construed by the Bureau and understood by the House and Senate Committees, would preclude any contest of the policy on the ground that the insured was totally and permanently disabled prior to his application for insurance. If the incontestability provision of the statute prevents the Veterans' Administration from denying payment of any contract on the ground that the insured was totally and permanently disabled prior to the time he applied for insurance, it also prevents the Court from doing so in a suit on said contract. The inhibition is upon the government itself, and therefore upon all its agencies concerned in the administration of the laws relating to such insurance.

It was never contemplated by Congress that any such insurance so granted should be subject to cancellation, *at some remote date,* by the Bureau or the Courts, upon a finding then made that the applicant was totally and permanently disabled at the date of his application.

It is to be remembered, in this connection, that the law authorized both term and converted insurance to be granted "without medical examination." Hence, a soldier, although *totally* disabled from injury or disease prior to his application, was nevertheless insurable against said total disability becoming permanent while his insurance was in force, as well as against death. It was for this reason, presumably, that the Attorney General held, as stated in his

opinion of July 18, 1919 (31 Op. Atty. Gen. 534) that a soldier was insurable even though *mortally ill* at the time of his application.

In these circumstances it was but reasonable and just that Congress should later act as it did to remedy this situation, first by making *all* contracts or policies of insurance, whenever issued, incontestable after a comparatively short period, except for fraud and nonpayment of premiums: and, finally, by making *all* such contracts or policies incontestable from date of issuance, reinstatement or conversion.

The Government is estopped from challenging the judgment

(c) As the long continued contemporaneous construction placed upon the law by the administrative officers of the Government charged with its enforcement should not be changed so as to disturb vested rights.

On December 16, 1921, the General Counsel of the Veterans' Administration promulgated instructions (see pages 59 and 60 of petitioner's brief, appendix) to the effect that if an application for reinstatement of insurance was approved and subsequently a rating of permanent and total disability was made effective as of a date prior to the date of reinstatement, such action on the part of the Bureau would not affect the validity of the reinstatement of insurance.

After the amendment of July 3, 1930, Administrator's Decision No. 41 was promulgated on April 10, 1931, which established the administrative policy (petitioner's brief, appendix, pages 62-63) of maturing reinstated contracts of converted insurance as of effective dates notwithstanding that the insureds were thereafter rated as having become permanently and totally disabled at a date prior to the reinstatement and conversion of such insurance. This administrative policy continued until July 26, 1932, when one of the courts held *contra* (petitioner's brief, appendix, page

62). No further instructions have been issued in view of the decision in this case (petitioner's brief, appendix, page 67).

This contemporaneous construction of this Act given by the Executive Department of the Government charged with the responsibility of its administration continued as it has over these years certainly consorts with the equities involved, is entitled to great respect and should be given weight. *United States* v. *The Alabama Great Southern Railroad Co.*, 142 U. S. 615; *National Lead Co.* v. *United States*, 252 U. S. 140.

As was said by this Court in the case of *United States* v. *The Alabama Great Southern Railroad Co.*, 142 U. S. 615:

> "We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

In the cases of *Anderson* v. *U. S.*, 36 Fed. (2d) 45 and *Jordan* v. *U. S.*, 36 F. (2d) 43, and *U. S.* v. *Jensen*, 36 F. (2d) 47, referred to in petitioner's brief, and the cases of *Kenneth E. Banks* v. *United States*, 36 F. (2d) 47 and *U. S.* v. *Crawford*, 40 F. (2d) 199, it is understood that the government paid the insurance after the enactment of the amendment to the War Risk Insurance Act on July 3, 1930, when Section 307, *ante*, was passed, notwithstanding the Circuit Courts of Appeal decisions.

Point Three.

This legislation is remedial in nature and should be liberally interpreted so as to give effect to the intention of Congress.

The Circuit Courts of Appeal decisions cited by petitioner in support of its contention relate to yearly renewable war risk term insurance and do not refer to United States Government Life Insurance.

A remedial statute must be construed liberally so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant. *Ross* v. *Doe,* 1 Pet. 665, 7 U. S. (L. ed.) 302; *United States* v. *Padelford,* 9 Wall. 531, 19 U. S. (L. ed.) 788; *Twenty Per Cent Cases,* 13 Wall. 568, 20 U. S. (L. ed.) 707; *Jones* v. *New York Guaranty, etc. Co.,* 101 U. S. 622, 25 U. S. (L. ed.) 1030; *Beley* v. *Naphtaly,* 169 U. S. 353, 18 S. Ct. 354, 42 U. S. (L. ed.) 775; *United States* v. *Southern Pac. R. Co.,* 184 U. S. 49, 22 S. Ct. 285, 46 U. S. (L. ed.) 425.

The law with respect to war risk insurance contracts is entitled to the most liberal construction in favor of the disabled veteran. *U. S.* v. *Cox* (C. C. A. 5), 24 Fed. (2d) 944; *McNally, et al.* v. *United States* (C. C. A. 8), 52 Fed. (2d) 440; *U. S.* v. *Phillips* (C. C. A. 8), 44 F. (2d) 689; *Glazow* v. *U. S.* (C. C. A. 2), 50 F. (2d) 178; *U. S.* v. *LePage* (C. C. A. 1), 59 F. (2d) 165; *U. S.* v. *Clarence P. Arzner,* 287 U. S. 470.

Point Four.

The better considered decisions of the Circuit Courts of Appeal are in respondent's favor and the cases cited by petitioner do not correctly state the law applicable to this case.

The case of *United States* v. *Chandler,* decided May 8, 1935, by the Fifth Circuit Court of Appeals (77 F. (2d) 452) in opinion by Circuit Judge Hutcheson, which was fol-

lowed by the United States Circuit Court of Appeals for the Seventh Circuit in the instant case, stated:

> "We do not agree with defendant that it may, in this proceeding, claim that plaintiff was totally and permanently disabled in 1925, when his original policy was reinstated, and that because he was he cannot recover now. We think the issuance of that policy is such an affirmation that there was a risk to be insured against as that defendant may not, on this evidence assert that the risk did not exist, or defeat recovery on these policies on the ground of an already existent disability without pleading and proof of fraud in securing the reinstatement. We think it clear that plaintiff can recover on the reinstated and extended policies upon proof that in December, 1930, he was totally and permanently disabled, and that he may not, absent proof of fraud in procuring his reinstatement, be defeated of recovery by the showing the proof makes that there was a disablement existing when the policies were reinstated."

The fundamental error in the reported decisions cited by petitioner is that they assume it was the intention of Congress in Section 400 and 401 of the War Risk Insurance Act, to grant *term insurance* against *death only* where a soldier had become totally and permanently disabled prior to applying for such insurance, as stipulated in War Risk Bulletin No. 1; whereas it is apparent from the language of said sections, and their legislative history, that the *sole* right of a soldier who had become totally and permanently disabled prior to making application for insurance, was to receive *automatic insurance* also provided for in Section 401. Hence said provision in War Risk Bulletin No. 1, upheld by said Circuit Courts of Appeals as valid, was in fact invalid, as in effect held by the Attorney General in his opinion of July 18, 1919.

The error of said Circuit Courts of Appeals in the decisions referred to in Petitioner's brief is fundamental because if a soldier, who had become totally and perma-

nently disabled before application for insurance, could not take out a valid policy of *term* insurance, then a refusal to pay disability benefits under such a policy on the ground of such prior disability would amount to an attack on the *validity* of the entire policy, and not merely to a dispute as to whether he came within the *coverage* of the policy, as said Circuit Courts of Appeals held.

Such a denial—being an attack on the validity of the insurance granted in its entirety—would necessarily be prohibited by the incontestability provision of the law, both as originally written in the War Risk Insurance Act by the Act of August 9, 1921, and as later reenacted as Section 307 in the World War Veterans' Act, 1924.

Another matter of great importance, militating against the correctness of said decisions of the Circuit Courts of Appeal is that, as above stated, such courts were apparently not advised, and therefore gave no consideration to the contemporaneous, uniform and long-continued practical construction of the Veterans' Bureau of the incontestability provision of the law governing these insurance contracts or policies—a construction which was called to the attention of the Committees of Congress which reported the amendment to said Section 307 made by the Act of July 3, 1930, and which amendment was made for the expressly declared purpose of overcoming the ruling of the Comptroller General, in 1929, adverse to the Bureau's long-established practical construction of said incontestability provision.

Cases cited by Petitioner relate to term insurance, while the contract here under consideration is for *converted insurance.*

In the case of *Hicks* v. *U. S.*, 65 F. (2d) 517, cited by petitioner in its brief filed herein, Circuit Judge Parker of the Fourth Circuit Court of Appeals first held that Section 307 as amended by the Act of July 3, 1930, forbade the government from contesting liability on the contract of war risk insurance on the ground that the insured was disabled when

the policy was applied. The *Hicks case, supra,* it will be remembered was a case involving term insurance only. Upon rehearing, however, he reversed his previous decision but clearly pointed it out in the latter decision (65 F. (2d) 517) that:

> "* * * the purpose of Congress in enacting the incontestable provision of the statutes, we think on further consideration, was not to enlarge or extend the coverage of policies issued under this regulation to persons who were totally and permanently disabled at the time of application, *but to prevent,* among other things, *the forfeiture of reinstated or converted policies on the ground of the prior disability of the insured.* An examination of the rulings of the Comptroller General shows that reinstated policies had been held void for this reason; and, as pointed out by Judge Fee in the *Stavros* case, it was to this that the committees of Congress were referring in their report from which we quote in our former opinion." (Italics supplied.)

The opinion on rehearing was based largely on the case of *Stavros* v. *U. S.,* 3 Fed. Sup. 213. That, however, was a case on Automatic Insurance and held that Automatic Insurance did not cover a disability existing at the time the veteran entered the army. The court said in the *Stavros case,* p. 218:

> "It seems eminently proper that where the United States has permitted a soldier to reinstate a policy which he carried during his war service in the absence of fraud it should not be permitted to discover permanent total disability has existed within six months after the re-issue and avoid recovery. The re-issue should relate back to the date of the original policy."

It is to be noted that in the instant case the trial court instructed definitely that the disability must be permanent and total before the insurance lapsed in 1932.

Jordan v. *U. S.,* 36 F. (2d) 43, was an action on a War Risk Insurance Policy, not a converted policy. The defen-

dant there in its answer set up the affirmative defense that "if the plaintiff was disabled at all he was as much disabled at the time of the issuance of the policy as at any time subsequent thereto and that he suffered no loss." The issue was whether or not he was totally and permanently disabled prior to the issuance of the original War Risk Insurance. No such issue was raised in the case at bar until it was too late for plaintiff to meet the issue by clearing up that point. In holding that "a policy of insurance does not ordinarily cover a loss already suffered" the court said:

> "It may well be that a recovery might be had thereunder for a permanent total disability which did not exist at the time the insurance was applied for in the event the applicant should recover from the earlier permanent total disability and again become totally and permanently disabled."

By analogy we suggest it is entirely possible that Patryas, even though he became permanently and totally disabled in 1924 through the years of rest might have for a period ceased to be considered permanently disabled by reason of the hope of improvement by removal of mastoid infection, and when this did not result he might again very properly be held to be permanently and totally disabled.

In this case judgment was entered on April 21, 1930, counsel is informed by the Clerk of the United States District Court at Phoenix, Arizona, and same was paid by the government.

In the case of *Schmidt* v. *U. S.*, 63 F. (2d) 390, cited by petitioner in its brief filed herein, the Circuit Court of Appeals for the Eighth Circuit held that the provision in War Risk Bulletin No. 1 that "if the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against each disability," was valid and to be deemed a part of the policy of war risk insurance issued to the appellant. That court sustained the action of the Dis-

trict Court in directing a verdict for the defendant on the ground that the evidence clearly showed that he was permanently and totally disabled at or prior to the time he secured his insurance contract.

No reference is made in that decision to the amendment to Section 307 made by the Act of July 3, 1930, or to the Committee Reports on said Act. And the opinion of the Attorney General of July 18, 1919, while incidentally referred to, was not analyzed by the Circuit Court of Appeals, nor its real scope and effect considered, so far as it bore upon the validity of the provision in said Bulletin No. 1 which the Court held to be valid. The permanent and total disability in that case had reference to the original War Risk Insurance policy at the time of entering the service, and not to converted insurance as is here involved.

An interesting discussion is had there on the question of the effect of the defendants not pleading the defense of a permanent and total disability at the time the policy was issued. The Court held that the benefit of the failure to so plead was waived by the plaintiff by not raising the question in the trial court and not assigning it as error. It is to be noted that in the case at bar this defense was not raised by the pleading and we raised the question as soon as such a contention became evident and are, we contend, entitled to the benefit of whatever admissions may be inferred from the fact that the only defense raised in our case was that the permanent and total disability did not exist prior to January, 1931.

Kaminsky v. *U. S.*, 64 Fed. (2d) 735, was a suit based on the War Risk Insurance policy and not a converted policy. The question involved there was whether he was totally disabled when he entered the army and that due to the mistakes or blunders of others a mental defective and imbecile entered the army and obtained insurance. The defect, being promptly discovered, he was discharged. The holding of the court was that the incontestable clause of the statutory War Risk Insurance did not preclude the gov-

ernment from defending on the ground of total and permanent disability existing *before insured entered the army.* In that case Judge Foster gave a strong dissenting opinion (which later became the unanimous opinion of the court in *U. S.* v. *Chandler,* 77 F. 452), in which he said:

> "In my opinion it was clearly the intention of Congress to close the door to any inquiry as to the mental and physical condition of the insured prior to the issuance of the policy of War Risk Insurance. This conclusion finds support in the well considered opinion of *Hicks* v. *U. S.,* 65 Fed. 517, decided January 10, 1933."

The majority opinion in the *Kaminsky case* did not discuss the Senate and House Committee Reports on the amendatory Act of July 3, 1930, nor recognize the scope and effect of the opinion of the Attorney General of July 18, 1918.

Circuit Judge Foster dissented in that case on the ground that the evidence of a physician skilled in mental diseases, excluded by the District Court, tending to show that Kaminsky was totally and permanently disabled because of his mental condition prior to his application for insurance, was of doubtful value and there was abundant evidence in the record, though disputed, to the same effect. The undisputed evidence, Judge Foster said, tended to prove that Kaminsky was strong physically, and healthy when drafted, and had been continuously engaged in a substantially gainful occupation, while the record left no doubt that at the time of his discharge from the Army he was in poor health and permanently and totally disabled.

A further ground of dissent was stated by Judge Foster as follows:

> "2. The District Court excluded the evidence of Dr. Green on the ground that the policy was incontestable from date under the provisions of the Act of July 3, 1930, sec. 24 (38 USCA, Sec. 51). Under the provisions of said Act all policies of war risk insurance there-

tofore issued were made incontestable from the date of issuance except for fraud, nonpayment of premiums or on the ground that the applicant was not a member of the military or naval forces of the United States. This section was made retroactive to April 6, 1917. It seems that the majority of the court would interpolate another exception into the statute and, in order to accomplish this, the theory is adopted that a defense based on the ground that permanent and total disability of the insured existed before he entered the Army is not a contest of the policy. The unsoundness of this theory is demonstrated by merely stating it, as the urging of any defense that would defeat a recovery would necessarily be a contest of the policy.

* * * * *

The provisions of the Act of 1930 are so plain as to hardly require construction, but if they do so the Committee reports submitting the bill may be looked to for light. Under the terms of the section as originally enacted policies did not become incontestable until six months after issuance. Act June 7, 1924, sec. 307 (38 USCA Sec. 518). Construing that section the Comptroller General had ruled, in effect, that the existence of permanent and total disability when originally applying for insurance, or reinstatement thereof, might be set up as a defense at any time. See the following cases: *Mary W. Woodall,* Jan. 16, 1930, 9 Comp. Gen. 291; *Philip McNish,* Mar. 9, 1928, 7 Comp. Gen. 551; *Marion Artley,* Jan. 23, 1929, 8 Comp. Gen. 387. There are other rulings of the Comptroller General to the same effect. The Committee reports Senate Report 1128, and House Report 874, 71st Cong., 2d Session, in practically identical language, say this * * There is no doubt in my mind that in enacting the statute Congress intended to prevent metaphysical rulings by bureaucracy and to avoid just such controversies as that herein presented. In my opinion it was clearly the intention of Congress to close the door to any inquiry as to the mental and physical condition of the insured prior to the issuance of the policy of war risk insurance."

In the case of *United States* v. *Stevens*, 64 F. (2d) 853, the Circuit Court of Appeals for the Eighth Circuit (Judge Van Valkenburg dissenting) held (reversing the District Court) that the insured could not recover on his reinstated policy of war risk insurance because the lower court had found that he had become disabled some time after the original policy had lapsed for nonpayment of premiums and several years before his application for the reinstatement of said policy.

In the majority opinion the court said:

> "We have failed to find, however, either in the statutes or in the debates or Committee reports of Congress relative thereto, any intention that the terms of the contract of insurance, whether original or reinstated, have changed in respect to the coverage of permanent and total disability. The terms of such contracts in that respect have remained as fixed by Bulletin No. 1, viz: that the United States insures the applicant, conditioned on the payment of premiums, for the amount of $...., payable to the insured if he, *while this insurance is in force, shall become* totally and permanently disabled." (Italics supplied).

An examination of the opinion of the majority of the court in the *Stevens case, supra,* shows, however, that it apparently confined its examination of the legislative history of the amendments to Section 307 made by the Act of July 3, 1930, to the debates and committee hearings with reference to the provision in the amendatory Act removing the bar of estoppel, which bar had theretofore been interposed by the Veterans' Bureau to a claim on an original contract where said contract had been reinstated or converted. The majority opinion quotes quite extensively from said debates and hearings on this question of estoppel, which Congress, in the Act of July 3, 1930, sought to overcome by enabling the insured to sue on any prior contract, if he chose to do so, without prejudicing his rights, where he also had a reinstated or converted contract. This

was because said Circuit Court of Appeals had previously held, in a former suit (*Stevens* v. *United States*, 29 F. (2d) 904), that plaintiff was estopped from suing on his original contract of war risk term insurance, which had lapsed for nonpayment of premiums.

Circuit Judge Van Valkenburg dissented in the second Stevens case on the ground that the Circuit Court of Appeals should be governed by its decision on the former appeal. He also thought that "the presumption that, prior to reinstatement, appellee was not permanently and totally disabled, must be upheld under the circumstances attending the act of reinstatement."

We feel that this Honorable Court in affirming this case should direct that the judgment entered herein be amended so as to provide for the refund to respondent of premiums paid on his converted insurance contract subsequent to the month of its issuance.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the action of the Circuit Court of Appeals should be affirmed by this Court.

Respectfully submitted,

STEPHEN A. CROSS,
Chicago, Illinois.

WARREN E. MILLER,
Washington, D. C.,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 445.—October Term, 1937.

The United States of America, Petitioner, *vs.* Stanley J. Patryas.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 28, 1938.]

Mr. Justice Black delivered the opinion of the Court.

January 31 1918, Stanley J. Patryas (respondent), then a soldier, purchased from the government a $10,000 yearly renewable War Risk Insurance contract which he permitted to lapse after his honorable discharge from the Army July 29, 1919. June 28, 1927, while a patient at a Veterans' Government Hospital, he obtained reinstatement of his War Risk policy and immediately converted it into a five year renewable term policy upon which he paid premiums to June 1932. Claiming total permanent disability, the veteran obtained, in the District Court, a verdict and judgment on his reinstated policy. Finding the issues for the veteran, the jury fixed the date of permanent total disability at 1924—a date three years before his policy was reinstated.

The Court of Appeals affirmed.[1]

The government's right to contest this policy is limited by the following statutory provision:[2]

"... policies of insurance ... issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, ..."

The question here is:

Can the government, in the absence of fraud or bad faith, "contest" and defeat payment of total permanent disability insurance,

[1] 90 F. (2d) 715, certiorari granted, — U. S. —.

[2] Sec. 307, World War Veterans Act, 1924, as amended July 3, 1930, c. 849, Sec. 24, 46 Stat. 1001.

sold to a World War veteran, on the ground that the veteran was totally and permanently disabled before the policy was reinstated and converted?

First. The government contends that "Congress has not, . . . authorized . . . insurance benefits for total, permanent disability existing prior to any contract of insurance on which the claim is made."

The original War Risk Insurance Act of October 6, 1917,[3] provided.

"That in order to give *every* commissioned *officer* and *enlisted man* and to *every member* of the *Army Nurse Corps* (female) and of the *Navy Nurse Corps* (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents . . . , the United States, upon application to the bureau and *without medical examination, shall grant* insurance against the death or total permanent disability of any such person . . ."

The War Risk Insurance Act must be considered in the light of its passage during war, while men and women were being called into war service. This requires recognition of its generous and liberal purpose to provide "greater protection for (soldiers, sailors and nurses) . . . and their dependents."[4] Its passage indicated Congress conclusively presumed that every person, who had successfully undergone mental and physical examination for war service, was—when inducted into such service—insurable against death and total permanent disability.[5] The Act commanded that insurance against death and total permanent disability be granted, without medical examination, to *every* applicant who had previously been examined and accepted for war service. Congress manifestly intended by these sweeping provisions that policies should be granted without regard to the health of applicants and should be enforceable obligations against the government. Any other construction of this broad, war time legislative grant to soldiers, sailors and nurses would take away the benefits Congress intended them to receive. The provisions of the War Risk Insurance Act are sufficiently comprehensive and inclusive to authorize its administrators to grant insurance covering past or future total

[3] Sec. 400, War Risk Insurance Act of Oct. 6, 1917, c. 105, 40 Stat. 409.
[4] See, United States v. Clarence P. Arzner, 287 U. S. 470, 472.
[5] See, United States v. Domangue, 79 F. (2d) 647, 648.

permanent disability, if such action is found necessary to carry out its far reaching national plan and purposes.

Second. It is contended that the government can contest liability on the ground that the veteran was totally and permanently disabled prior to the reinstatement, despite the provision that such policy "shall be *incontestable* . . . except for fraud, nonpayment of premiums, or on the ground that applicant was not a member of the military or naval forces of the United States, . . ." It is urged that this provision "has no application where, as here, the validity of the policy is not questioned and liability under it is denied solely on the ground that a loss has not occurred during the period of insurance protection." However, it is admitted that this policy did not "expressly exclude total permanent disability *occurring prior to insurance protection, as did the language of the original term contract.*"

This converted policy of insurance provided protection against loss from two causes: namely, death and total permanent disability. A provision making a policy "incontestable" except for certain clearly designated reasons, is wholly meaningless and ineffective if, after proof of the loss insured against, the policy can be contested upon grounds wholly different from those set out in the exception. The object of the provision is to assure the insured that payment on his policy will not be delayed by contests and lawsuits on grounds not saved by the exceptions.[6] Here, it has been established that the veteran is totally and permanently disabled. Yet his policy is contested on the ground that it does not insure against this disability because it existed before the policy was issued. If this defense can be interposed, his policy has never actually protected him against total permanent disability. Since permanent total disability is one of the two risks insured against in the policy, any contest (not based on the exceptions) which may prevent the policy holder's recovery for such admitted total permanent disability—existing while the policy is in force—is a "contest" forbidden by the "incontestable" provision.

No legal obstacle prevents parties, if they so desire, from entering into contracts of insurance to protect against loss that may possibly have already occurred. Marine insurance and ante-dated

[6] Northwestern Life Ins. Co. v. Johnson, 254 U. S. 96, 101, 102.

fire insurance policies frequently afford protection against risks which, unknown to the parties, have already attached.[7]

Even with the benefit of scrupulous good faith, it is not always easy to determine with complete certainty whether or not total permanent disability exists. This uncertainty may lead an insurer, after his own investigation, and for adequate compensation, to treat unknown past and uncertain prospective disability, upon the same basis. This case is an illustration. Here, the government has never admitted that the veteran is totally and permanently disabled. It not only issued him a policy against such disability—with complete knowledge of his then condition—but in this continued contest has denied that the policy-holder was totally and permanently disabled at any time—before, when, or after the policy was issued. There was also a sharp conflict of evidence on this disputed fact.

When a policy of disability insurance is issued after complete examination by the insurer and full and fair disclosure by both parties, there is no legal reason why the insurer cannot contract to afford full protection against loss resulting from past as well as prospective disability. This veteran's policy did not expressly limit liability to *prospective* total permanent disability. The provisions of the policy in this regard contain a promise to pay the veteran "in . . . event of the total, permanent disability . . . (and) Upon due proof of the total permanent disability while this policy is in force, . . ." Original policies issued under the War Risk Act expressly excluded liability for total permanent disability incurred before the policy "was applied for." The deliberate omission, in the converted policies, of this previous exclusion, the language and purport of the original Act and its amendments, the administrative interpretations and legislative history, all throw a flood of light on the intention to include liability for disabilities existing prior to the issuance of the policies.

For more than a decade prior to 1934, (during which period this veteran's policy was purchased), the Bureau, unvaryingly ob-

[7] Gen. Interest Ins. Co. v. Ruggles, 12 Wheat. 408; see, Hooper v. Robinson, 98 U. S. 528, 537; Pendergast v. Globe, etc., Ins. Co., 246 N. Y. 396; Hallock v. Ins. Co., 26 N. J. L. (2 Dutch.) 268; see, Springfield Fire & Marine Ins. Co. v. Nat. Fire Ins. Co., 51 F. (2d) 714, 718-719. A valid aleatory contract may be based on an unknown past event. 3 Williston, On Contracts, (Rev. Ed.), Sec. 888.

serving the statutory mandate, announced and applied the practice that "insurance was incontestable except for the grounds specifically enumerated" in the incontestable provision. A "*subsequent rating* of permanent total disability *effective as of a date prior to the date of reinstatement*", under this consistent administrative interpretation and practice, did "not affect the validity of such reinstatement." Because of court decisions and rulings by the Comptroller General tending to nullify and defeat this administrative practice[8] the Veterans' Administration urged the amendment of July 3, 1930, to confirm its practice and to strengthen and clarify the incontestable provision. For this purpose, the Administrator of Veterans' Affairs testified before the Senate Committee as to the necessity for this amendment:[9]

"This is a very sweeping amendment and will place beyond contest many contracts and policies of insurance which otherwise would be contestable. It is a well recognized principle of commercial insurance companies, however, and *in reality is only a clarification of the existing law which was practically nullified by a recent decision of the Comptroller General.*"

The Solicitor of Veterans' Affairs also testified:

" . . . the present World War Veterans Act of 1924 as amended, contains a provision to the effect that where a policy is maintained in force for a period of six months, it should be incontestable, except for fraud or nonpayment of premiums. *We have followed that, and in all cases where the policy has remained in force for six months* we have paid the claim, irrespective of the merits of it, unless there was fraud or failure to pay premiums. . . . However, under date of January 16, 1930, *notwithstanding the long practice of the bureau*, the Comptroller General, in the case of Mabry W. Woodall, held that if a man *was permanently and totally disabled* at the time he applied for a reinstatement of insurance, or conversion of insurance, . . . *the policy was not incontestable, the statute did not protect it* . . .".

In the *Woodall* case referred to, the Comptroller General had held:

" . . . if the insured *was in fact* dead or *permanently and totally disabled, at the date of application, reinstatement or con-*

[8] 9 Compt. Gen. 291; Jordan v. United States, 36 F. (2d) 43; Golden v. United States, 34 F. (2d) 367.

[9] H. R. 10381, 71st Cong., 2d Sess., Hearings Senate Committee on Finance, pages 90-91.

version, . . . the insurance was subject to subsequent contest. . . . Accordingly, the rule may be stated that *where the Veterans' Bureau has heretofore established or may hereafter establish the condition of permanent total disability at or prior to date of original application for insurance, or application for reinstatement and/or conversion of insurance, . . . the insurance should be considered as invalid . . .*"

The Senate Report on this amendment[10] stated:

"*The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. This incontestability would protect contracts . . . where the applicant was not in the required state of health, or was permanently and totally disabled prior to the date of application, . . .* It is appreciated that this is a broad provision, but it was felt that *it was necessary* in order to do justice to the veterans, . . . and *to overcome decisions of the Comptroller General which practically nullified the section as it now exists.*"

The conclusion is inescapable that Congress enacted the 1930 amendment in order to overcome the effect of the above rulings of the courts and the Comptroller General, and with the intention to sustain the Bureau's previous administrative interpretation and practice under the incontestable provision.

To resist payment of this veteran's insurance policy on the ground that he was totally and permanently disabled prior to the issue of the policy, is to "contest" payment within the generally accepted meaning of the word and violates the "incontestable" provision. The purchaser of a policy contract containing a provision that the insurer waives its right to contest except for fraud, nonpayment of premiums, and lack of military or naval service, is entitled to rely on the plain terms and inducements of the provision which limits the grounds for contest of liability to those specifically reserved.[11] The incontestable provision here means that a claim of a veteran whose death or total permanent disability is established shall not be contested except for fraud, nonpayment of premiums or on the ground that the insured had not really been a member of the war forces of the nation or because he was included

[10] Senate Report No. 1128, 71st Cong., 2d Sess., on H. R. 13174.

[11] See, Northwestern Life Ins. Co. v. Johnson, *supra*, at 102.

in Title 38, U. S. C., Sec. 447.[12] Congress evidently believed these exceptions afforded the government ample protection against impositions or unjust claims and intended to limit the right to contest these policies to the specific grounds reserved in the exceptions. The judgment of the Court of Appeals is

Affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[12] 38 U. S. C., Sec. 518, and Sec. 447. This reference to Sec. 447 excluded from the benefits of this incontestable provision any person who had been discharged or dismissed from the service on the ground that he was "guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he was found guilty by a court martial, or that he was an alien, conscientious objector who refused to perform military duty or refused to wear the uniform, or a deserter, etc."